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MARINE INSURANCE.

LECTURES

BY

F. H. CAREY.

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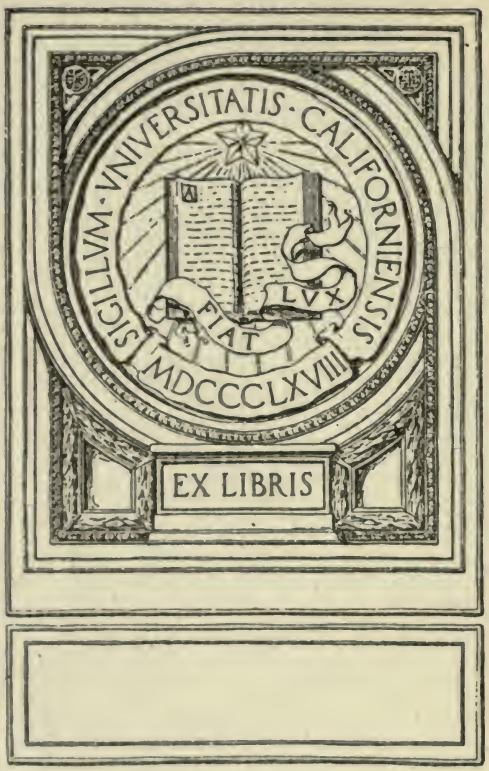
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UNIV. OF CALIFORNIA

Marine Insurance.

A Series of Lectures

Delivered by

F. H. CAREY, Esq.,

Adjuster of Marine Claims
to the
LONDON ASSURANCE
CORPORATION.

Reprinted from LLOYD'S LIST.

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PREFACE.

THE following Lectures, which were delivered under the auspices of the Institute of London Underwriters and are printed by the courtesy of the Committee of Lloyd's, are of an elementary character, and are intended to give the reader an opportunity of acquiring the rudiments of the claims side of Marine Insurance and to enable him to better understand the text books when he decides to make the subject a matter of close study.

The Lectures may, however, in addition be of some assistance to those who have a preliminary knowledge of the subject, and may be of use to those engaged in Merchants' Offices whose business it is to deal with claims on Marine Insurance Policies.

I would add that English practice differs in many respects from the practice in other countries, and I have dealt with the matter entirely from the English point of view.

F. H. C.

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FIRST LECTURE.

Delivered November 16, 1920.

CARGO CLAIMS.

Method of Calculation.

APPLICATION OF FRANCHISE CLAUSE.

One is much tempted when dealing with Marine Insurance to inquire closely into its introduction into this country, a subject of much interest, but the object of these lectures is to endeavour to impart to the uninitiated such information as will enable them to appreciate and understand what I might call the rudiments of the subject, and to add to the knowledge of those who have some acquaintance with it. I feel, however, that it will not be inadvisable if, before commencing my lectures, I make some reference to this matter, but it will be quite short and of a mere cursory character. In the Middle Ages there flourished two great associations or bands of traders—one the Hanseatic League, who traded between the Baltic and the North with the South, and the other the Lombards, who traded between the Mediterranean and the South with the North. The principal centre for these two sets of traders was Bruges—that old world city of Belgium to which so much reference has been made during the war. It is only to be supposed that the natural outcome of a flourishing trade by sea would be a demand for the institution of some system by which a merchant could protect himself against the risk of losses arising from sea perils. There

was, therefore, established at Bruges in 1310 a chamber of Insurance where the merchant could insure his goods and thus obtain that security against loss without which trade by sea could not progress and would never have reached its present gigantic proportions.

OVERSEAS TRADE EXPANSION.

The Traders of the Hanseatic League and the Lombards naturally did not overlook this country in the course of their operations. No doubt they brought with them the practice of Marine Insurance. The invaders were eventually ejected from this country as our forefathers considered that they were able to carry on without the assistance of other gentlemen, and the trade between this country and overseas began to expand rapidly; the practice of Marine Insurance was continued, and was, in fact, legalised by Act of Parliament passed in 1601 during the reign of Queen Elizabeth. The preamble of the Act reads as follows:—

> By means whereof it cometh to pass that upon the loss or perishing of any ship there followeth not the undoing of any man but the loss lighteth rather easily upon many than heavy upon few, and rather upon them that adventured not than upon those who do adventure: whereby all merchants especially those of the younger sort are allowed to venture more willingly and more freely.

There is, therefore, evidence that the practice of Marine Insurance was well established in this country as far back as 1601. If we examine a Marine Insurance Policy we find its terms are expressed in somewhat quaint language, but which is nevertheless quite suitable for present-day needs, and one may imply therefrom that the basis of Marine Insurance to-day is not much changed from that adopted many years ago. Take, for instance, the policy issued by my own Corporation—the London Assurance. It

commences with the words, " In the name of God, Amen." This pious expression seems to imply that in the early days the negotiations for a Marine Insurance were considered to be of a solemn character and were conducted in a serious manner. In the present days there is very little solemnity in an Underwriter's room, but there is a good deal of seriousness when the green slips from Lloyd's tell of a heavy loss or casualty. There is one solemn part of the custom which, however, remains, and may it always remain—that is Honour. Honour is the foundation stone on which has been constructed our huge Insurance Market, and it is well to bear this in mind when we have to deal with claims on Marine Insurance policies.

Then, later on, one finds the words, " Beginning the Adventure upon the said goods, &c., &c. . . ." The use of the word " Adventure " perhaps requires a short explanation. You will remember this word in the quotation I gave from the Act of Parliament passed in 1601. In those days, when steamships were unheard of, one can readily imagine that a journey by sea was indeed an adventure; there were few lighthouses, no telegraphy, ill-provisioned ports, no Lloyd's Agents, no wireless and little means of succour in the event of a casualty. Thus, the word " Adventure " was a true description of the undertaking when a vessel left port for a far-away place with her cargo. The owners of the ship and the owners of her cargo were called co-adventurers, inasmuch as the former had ventured his ship and the latter their cargoes to the mercies of sea perils. In the very early days of shipping the owners of the cargo themselves used to accompany their cargoes, so they, too, were in reality adventurers, although this ancient custom died out many years ago, yet recently in a case before me it transpired that a merchant shipping goods from one Black Sea port to another sent his representative with the goods. The vessel put into a port on the way, and the merchant's representative went ashore to have a look round, and finding an opportunity of selling

the goods to better advantage at that port than at the port to which they were destined, had the goods discharged at the intermediate port. So one sees that in new circumstances we sometimes come across old customs.

Then there is reference to pirates, rovers, letters of mart and counter-mart—expressions which take us back to the days of Drake and remind us of the literature of our school days. Later on in the policy appears the following phrase :—

> And it is agreed by us, the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street, or in the Royal Exchange or elsewhere in London.

As Lombard Street was the district allotted by the authorities to the Lombards for their operations, one may conclude that the Lombards, in addition to being moneylenders or bankers, also engaged in Marine Insurance. The reference to the Royal Exchange indicates that Underwriters used to congregate in the Royal Exchange for the purpose of transacting their business.

THE QUESTION OF CLAIMS.

In dealing with the claims side of Marine Insurance I will first refer to what is commonly known as the memorandum. If you will look at your policy you will see that the main wording of the same concludes with the following clauses :—

> Free from all Average on Corn, Flour, Fish, Salt, Saltpetre, Fruit, and Seeds, except General or the Ship be stranded. Free from Average on Sugar, Rum, Hide, Skins, Hemp, Flax, Rice and Tobacco, under Five pounds per cent., and on all other Goods the freight and ship, under Three pounds per cent. except General, or the ship be stranded, sunk or burnt.

The words "free from" mean that the policy is free of average, &c.—in other words, the Underwriter does not pay for average on corn, flour, &c., unless general or the ship be stranded, or for average on sugar, rum, &c., unless such average amounts to 5 per cent., and on other goods unless it amounts to 3 per cent., or is general or the ship be stranded, &c. It is very necessary to bear this closely in mind, for I have known a holder of a policy in connection with the F.C. & S. clause to assert that the words "Warranted free from" meant that he, the assured, was to be freed from any loss, &c., and that such loss would be borne by the Underwriter. One moment's consideration shows the fallacy of such an assertion. If we take the ordinary F.P.A. clause and accept this contention what would be the result? Unless the ship be stranded, sunk or burnt, &c., the assured can recover particular average, but if the vessel is stranded, sunk or burnt then the assured cannot recover for particular average, which would be absurd. Take particular notice of the fact that losses arising from General Average are excluded from the operation of these clauses.

This word "Average" is a somewhat puzzling word and it may appear to many difficult to understand why we should continue to use the word in a Marine Insurance policy. As commonly used we hear of it in connection with our batting and bowling averages, or we employ it more or less to our advantage when we consider the possibility of a claim under our Pluvius policy. I do not propose to consider the origin of the word. If I did (and I am not sure that I could satisfactorily do so) it would take some time and would not be altogether relevant to the object we have in view. The word "average" really means "division," i.e., division of loss, division of burden or division of results. For example, the runs I have made at cricket during the season are totalled up and divided by the number of times I

have batted and the result is my batting "average." In the same way you average or you should average your weekly expenditure so as not to exceed the income of the year. Now there are two kinds of average—one Particular or, as it is in some countries designated, "Simple Average," and the other General Average—so called in all countries.

GENERAL DIVISION OF LOSS.

To explain the application of the word "division" to General Average is quite simple. The owner of a vessel arranges with certain owners of cargo to carry their goods to certain ports. The vessel meets with an accident—say goes aground, and the Master engages a tug to pull the vessel off, and the tug succeeds in so doing. The Master or the owner of the ship has to pay to the owner of the tug a sum of money for the services rendered by him to the ship. Now the Master in engaging the tug did not do so for the purpose of serving the ship alone, but for the purpose of saving the cargo also and thus enable him to prosecute the adventure. It is therefore only right and proper that the money so paid should be borne by all the adventurers, i.e., each should contribute a share and the money so paid should be "averaged" or "divided" or "equalised" between all the interested parties. Thus we see that it is easy to understand how General Average is none other than general division of a loss between all concerned in the venture. If a ship caught fire and water was used to extinguish the fire and caused damage to the cargo, the loss arising from such damage would be called a general average loss, and the co-adventurers would have to contribute to such loss in the same way as they would in the case of money paid to the tug. These remarks will, I hope, give you some idea as to the meaning of the word "General"

Average, a subject which I shall deal with in a later lecture.

If what I have said explains the definition of average as meaning division when applied to General Average, you will naturally ask how I can give the same definition to average when applying the word to particular average. I submit the following explanation. In former times, before the establishment of the first Marine Insurance Companies in 1720, the year in which the Royal Exchange Assurance Corporation and the London Assurance Corporation first saw the light, Marine Insurance used to be transacted by individuals or Underwriters, as they used to be called, who were the forerunners of the present institution known as "Lloyd's." When an insurance was offered, these individuals, if so disposed, took certain shares on the risk, as is done at Lloyd's now. If a claim arose on a particular shipment, the particular individuals who insured the shipment would have the loss averaged or divided or equalised between them in proportion to the share of the risk which each had underwritten, and it is in this way that I reconcile my definition of average as applying to Particular Average.

In fact, we might describe Particular Average more easily by saying that it represents damage sustained by cargo which has to be borne solely by the owner of the particular cargo damaged, as distinct from General Average which is to be borne by all owners of the cargo and the shipowner and/or Charterer. The owner of the damaged goods can recover the loss direct from his Underwriter, if it is admissible as a claim under the policy. To say that "average" merely means damage is misleading, because we should then say that general average means general damage, whereas general average means much more; it includes expenditure, such as the instance I have quoted of money paid for assistance.

THE 1906 ACT DEFINITION.

The Marine Insurance Act, 1906, Sect. 64, describes a particular average loss as follows :—

> A Particular Average Loss is a partial loss of the subject matter insured, caused by a peril insured against and which is not a general average loss.

It is necessry to distinguish between a Particular Average loss and a General Average loss. The Marine Insurance Act describes a General Average loss as follows :

> A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice.
>
> There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure.

In the insurance of goods there are two general classes of insurance. One " F.P.A.," i.e., warranted free of Particular Average, and the other " With Average," described as W.P.A. or W.A., i.e., with Particular Average. The policy covering goods insured F.P.A. must contain the F.P.A. clause; the wording of the F.P.A. clause is not always in the same form, but for my purpose I will deal with the Institute F.P.A. clause— the one generally in use, which reads as follows :

> Warranted free from Particular Average unless the vessel or craft be stranded, sunk or burnt, but notwithstanding this warranty the Assurers are to pay the insured value of any package or packages which may be totally lost in loading, transhipment or discharge, also for any loss of or damage to the interest insured

which may reasonably be attributed to fire, collision or contact of the vessel and/or craft and/or conveyance with any external substance (ice included) other than water, or to discharge of cargo at port of distress, also to pay landing, warehousing, forwarding and special charges if incurred for which Underwriters would be liable under a Policy covering Particular Average.

We see here that unless certain specified events happen either to the ship or cargo, the policy is free of Particular Average.

EFFECT OF THE CLAUSE.

The effect of the clause is that unless the ship be stranded, &c., Underwriters will be free from liability to pay Particular Average. If, however, the ship is stranded, &c., the Underwriters will be liable to pay Particular Average irrespective of percentage. The Particular Average need not necessarily be caused by the stranding, &c. The accident, stranding, sinking, &c., breaks the warranty and turns the policy from an F.P.A. policy to a W.P.A. policy. It may seem somewhat strange at first sight that it is not necessary that the damage should be caused by one of the accidents, but the origin of this clause is probably due to Underwriters refusing to insure certain classes of goods against damage unless the vessel met with an accident. The original intention may perhaps have been to pay only the damage caused by the accidents enumerated, but if it were so the clause was not properly expressed. The American F.P.A. clause is so worded that the Underwriter pays only such damage as arises from the accidents mentioned in the clause. The clause further expresses other conditions under which the F.P.A. Underwriter will bear certain damages, such as damages which may reasonably be attributed to collision or contact, &c.

Having explained, I hope quite clearly, what is meant by Particular Average, I will now proceed to describe the method of cal-

culation. The formula for calculation is as follows:—Ascertain the depreciation by a comparison of the *gross* sound and damaged values and apply the percentage of depreciation thus ascertained to the value for which the damaged goods are insured. To put the principle into practice I will take the following easy example:—

2 bales of goods are insured for £100 each £200

1 bale is damaged:

Sound value £90
Is sold for 45

Loss £45
=50%

Insured value £100 at 50 per cent., £50.

The law of marine insurance is based upon the principle that the Policy is a contract of indemnity, that is, in the event of a loss or damage, the owner becomes completely indemnified. This is true provided the loss is due to a peril covered by the Policy and that the owner has insured his interest for its full value, otherwise it is a contract of indemnity with certain limitations. Let me explain. A merchant insures a shipment of 10 cases of goods for £500. When the ship arrives at its destination it is found that three cases are damaged and the rest are sound. The sound goods, i.e., seven cases, are sold and realise £420, or £60 per case. If the ten cases had all been sound he would have received £600, viz., £60 per case. The three damaged cases are sold for £30 each, or 50 per cent. loss. What is his loss?

7 sound cases sold for £60 per case ... £420
3 damaged cases sold for £30 each ... 90

Total proceeds £510

This amount deducted from the £600 shows his loss at £90. If the Policy were an absolute contract of indemnity he would recover £90. What does he recover (using the before-mentioned formula for ascertaining the loss)?—

If the goods had been sound they would have realised £600
As 3 were damaged they only realised 510
Loss £90
=15%

Or in other words, had the 3 damaged cases been sound they would have realised £180
But being damaged they only realised 90
Loss (50 per cent.) £90

Unfortunately for the merchant he has not insured his goods for £600 but only for £500, and he can only recover from his Underwriter 15 per cent. on £500, say, £75, or if you take the three cases alone 50 per cent. on £150 or £75. He is therefore a loser of £15. In this particular instance the Policy does not act as a contract by which the assured becomes fully indemnified. The value in the Policy, except in the case of fraud, is a fixture, and the settlement of losses must be based thereon.

POSITION OF MERCHANT.

It is not open to the Underwriter nor to the assured to disturb this valuation except, of course, by agreement. While, however, the policy is not, in the instance I have mentioned, a complete indemnity to the merchant, yet in other cases he may be more than indemnified. I will take the same example as I have already given, but will reverse the figures of the sound and insured values. The sound value in this case is £500, or £50 per case, and the insured value is £600, or £60 per case. If the shipment had arrived sound the merchant would have realised £500

7 cases sound at £50 each realise £350
3 cases damaged realised 50 per cent., on £50 each, i.e., £25, three cases 75
425
Loss (15 per cent.) £75

The insured value being £600, the merchant receives £600 at 15 per cent., viz:— £90, or £15 more than he has lost.

In the first-mentioned case it is always open to a merchant when he finds, after he has insured his goods, that the market price has risen, to take out an additional insurance on increased value, and to recover a similar percentage of depreciation on such increased value as he recovers on his first policy.

In the few very simple examples I have given you I hope that I have shown clearly the method of calculating a Particular Average. You must not, however, imagine that every Particular Average claim can be calculated with such ease as in these examples; but if I have made the principle clear, then it only requires practice and experience to enable you to calculate an ordinary Particular Average claim. Some claims are so involved that much time and expert knowledge is required in the adjustment, and we leave those to the expert average adjuster. I will, however, give one example of a more complicated claim. We will assume that a merchant has dispatched abroad 10 cases of cotton goods, insured for £300, and on arrival one case appears to be damaged. The merchant calls on Lloyd's Agent and informs him that his shipment has arrived damaged. The Agent appoints a Surveyor to inspect the goods and issue a survey report. The report shows that out of 10 cases Nos. 1 to 10, one case, No. 7, is damaged by sea-water, and the Surveyor recommends the case be sold.

The invoice shows that the 10 cases are not of equal value. The shipment consists of a number of yards of cloth, say 1235, of which—

600 yards are invoiced at 4s. ...	£120	0	0
635 yards are invoiced at 5s. ...	158	15	0
	£278	15	0
Less discount 5 per cent.	13	18	9
	£264	16	3
To which must be added cartage, freight and insurance, say	25	3	9
	£290	0	0

The first proceeding will be to arrive at the actual invoice value of the damaged case, which contained 125 yards, part of the 635 invoiced at 5s. per yard, so that—

125 yards at 5s.	£31	5	0
Less 5 per cent. discount	1	11	6
Which leaves	£29	13	6

We then divide the proportion of £25 3s. 9d. applicable to case No. 7. We will, in this case, assume that the £25 3s. 9d. is really arrived at *pro rata* to the value of the various goods, in the same way as the 5 per cent. discount is *pro rata* to the value of the various goods. If this were not so it would be necessary to go into a close calculation to find out the actual share of the charges applying to case No. 7. As, for instance, the case being a different size, freight would be different, because freight will be paid on the size or weight of the case, and not on the value of its contents; but I will not impose on you a difficult sum in arithmetic, but merely for the purpose of illustration will assume that the charges are *pro rata* according to the value of the cases. Now, the charges can be ignored, since the result of the apportionment will be precisely the same whether they are taken into account or not. We then proceed as follows:—

If £278 15s. (the value of the cases irrespective of discount and charges) are insured for	£300	0	0
Then the invoice value of case No. 7, £31 5s. (irrespective of discount and charges) will be insured in proportion for	33	12	7

PERCENTAGE OF DEPRECIATION.

You ascertain, as I have already shown you, the percentage of depreciation by a comparison of sound and damaged values, and you apply this percentage to the insured value of case No. 7, which, added to the survey fee and any extra charges incurred owing to the case being damaged,

gives the claim on the Underwriter. I would mention here that when the claim has to reach a certain franchise before it can be recoverable under the policy (say, for instance, the policy is to pay average 3 per cent. on each case), it must be the depreciation that must amount to 3 per cent. If the depreciation only amounted to 2 per cent. and the survey fees and charges brought the claim to above 3 per cent., the claim would not be admissible because these charges cannot be taken into account in estimating whether the claim reaches the necessary franchise.

The method of calculation of Particular Average is based on a sound principle. The value of the goods having been fixed by the parties when arranging the insurance it cannot be affected by the rise or fall in the market value. Underwriters are not liable for loss of market. If, owing to delay, the ship arrives late at her discharging port and during the delay the market has fallen, and the merchant has to sell his goods on a falling market, the resulting loss is a loss of market. The Underwriter insures the goods, he does not undertake to indemnify the merchant against delay, even if such delay is due to a peril insured against. This is quite fair If the ship made a very speedy voyage and when the goods arrived the market was rising, the resulting profit belongs to the merchant—he does not hand it over to the Underwriters. Let me show what I mean by a case which was recently put before me. I exaggerate the figures in order to make the point more clear. Six bales of gunnies arrived damaged, but if sound at the anticipated date of arrival in May last would have realised £480. They were insured for £500. Unfortunately for the merchant, owing to adverse circumstances among which was congestion at the docks, he did not obtain his goods until August, by which time the market had fallen and the sound value was then only £300. The damaged bales were sold for £90. The merchant presented his claim as follows:—

6 Bales sound value £480
Realised damaged 90

Claim on Underwriter £390

You will observe that he expects to receive the same money as if the goods had arrived in May, i.e., £90, from the sale and £390 from his Underwriter. That is wrong. If the goods had been sold in August he would only have received £300, and thus, owing to the fall in the market price, he would have lost as much as £180 if the goods had been sound. It is quite clear he could not have claimed anything from his Underwriter in that event. The goods being damaged is fortunate for him because he had insured them at the higher figure and the percentage of depreciation for which the Underwriter is liable is applied to the insured value and not to the low sound value of September. The claim on the policy is therefore as follows :—

Sound value £300
Sold for 90

Loss ..... (70 per cent.) £210

Applied to the insured value of £500...£350.

So he receives from the sale £90, from his Underwriter £350, together £440, instead of £480, which he would have received had the goods arrived sound in May, and a gain of £140 if the goods had arrived sound in August. The gain must not in any way be looked upon as an indemnity for loss of market, but is merely due to the fact that the insured value was much in excess of the sound value in August. This example will emphasise what I have already pointed out, viz., that the insured value is the basis upon which the amount of an Underwriter's liability is determined, whether advantageous or disadvantageous.

CALCULATION OF LOSS.

Now, it must be borne in mind that this method of calculating a loss on cargo is only applicable when goods arrive at their destination. If by reason of a peril covered

by the policy the goods never reach their destination, but are sold at an intermediate port, the loss is calculated on another basis. Let us suppose that a vessel is wrecked during the voyage and the goods are salved and taken to the nearest port, and it is considered inadvisable, on the ground of great expense, to forward the goods to destination; they are sold at the intermediate port. The claim on the Underwriters would be for the insured value, and they would be entitled to the proceeds after deducting the expenses of salvage and all other charges that may attach to the cargo.

On the other hand, however, if goods reach their destination, it is immaterial how badly damaged they are; the claim is calculated on the basis of a Particular Average. There is one exception—that is when goods do not arrive in specie—i.e., when they arrive at destination so badly damaged that they have lost their character—say, for example, when hides are so damaged that they can no longer be called hides and cannot by reconditioning be reconverted into hides. I have in mind a case where wheat in a sunken barge was salved in a deplorable condition, and in which it could not be called wheat, but only pigs' food. It was, however, sent to a kiln and dried, and was thus again converted into wheat. The assured claimed as for a total loss, but the Court held that the claim was one of Particular Average.

It sometimes happens that in consequence of an accident involving G.A. the vessel delivers part of her cargo in damaged condition and without marks, so that the shipowners cannot tell to whom the damaged goods belong. What is the shipowner to do? Supposing a cargo of jute is concerned and there are, say, twenty different consignees, ten whose cargo is identifiable—i.e., the marks are distinguishable—get their cargo in full, the remaining ten each have part of their cargo short, say, five have five bales short and the other five have 10 bales short—that is a shortage of 75 bales jute.

The unidentifiable jute therefore represents 75 bales or what is left of them. The shipowner tenders to each of the first five consignees 5/75ths and to each of the second five consignees 10/75ths of the unidentifiable jute, much to the annoyance of the consignees who do not want the damaged jute. As a rule, to avoid this annoyance the shipowner generally arranges for the whole of the unidentifiable jute to be sold and each consignee gets his share of the proceeds in due course.

In this latter case, although the consignee does not receive his goods the claim on Underwriters is a Particular Average and not for the insured value of the goods less proceeds. It is, however, not unusual in such cases, especially if the amount involved is not large, for the Underwriter to pay the insured value of the goods short delivered and receive the share of proceeds when the statement is issued, for it more often than not happens that the proceeds cannot be apportioned until the General Average statement is completed. General Average statements take a long time to prepare and the cargo owner is often desirous of closing the matter in his books at once, and does not want to wait until the statement is issued. Nevertheless such a payment is a concession on the part of the Underwriters and not a legal right on the part of the assured.

You may say why all this fuss about settling as for a Particular Average instead of paying the insured value and receiving proceeds. There are two reasons: 1. If the goods are over insured the Underwriter pays the whole of the amount over-insured instead of a percentage thereon. 2. He would only be entitled to the net proceeds, i.e., proceeds after deduction of freight and landing charges, whereas in a Particular Average these charges are borne by the consignee. If, however, the freight is paid at port of shipment there is less objection to paying the insured value of goods short delivered.

THE GROSS VALUE BASIS.

You may perhaps wonder why the particular average should be based on gross values, i.e., cost plus freight and charges and not on net value, i.e., cost without freight and charges. The reason is that of the two methods the gross value basis is the more equitable. To enable the merchant to sell his goods he has to pay freight and landing charges. If you deduct freight and landing charges, why not deduct charges prior to shipment—they all form part and parcel of the market value at destination. I have shown that the merchant's loss is the difference between the sound value and the damaged value which results in a certain percentage of depreciation, and the Underwriter ought only to pay this percentage of depreciation on the amount for which the client has insured his goods. This is only fair. I will give you an example of calculating a Particular Average on the two different methods.

GROSS VALUES.

Insured value	£100
Gross sound value	100
Gross damaged value	70
Loss 30 per cent.	£30

The assured having insured his goods for their actual arrived market value recovers his whole loss, neither more nor less. Taking similar figures and basing the claim on

NET VALUES.

The insured value		£100
Gross sound value		100
Freight, duty and other charges ...		30
		£70
Damaged value	£70	
Freight and charges	30	
		£40
Loss (say 42 per cent.)		£30

The actual loss on sale in both cases is the same, but there is a gain on the net value basis of £12, although the amount insured and the sound value are the same.

In countries where heavy import duties are payable, the Underwriters sometimes agree to pay claims based on values less duty. In such cases they no doubt receive a commensurate premium for the increased liability they incur through claims being based on such values. I once had a case before me where a settlement on values less duty resulted in a total loss. The case concerned some tin plates which were found badly damaged at New York. I do not remember the actual figures, but the claim worked out something like this :—

Insured value		£100
Sound value, including duty		175
Duty		75
Net value, after deduction of duty		£100
Damaged value	£70	
Duty	75	
No proceeds		—
Loss		£100

This is an exceptional case, and is due to the fact that the same duty is payable on the damaged goods as the owner would have had to pay if they had been sound. If the duty is payable *ad valorem*, i.e., on values, then such extreme results would not arise.

Now, of course, it does not follow that because goods are damaged they must necessarily be sold. It is often more to the advantage of both the consignee and the Underwriter that the former should accept the goods with an allowance. This saves auction expenses and the assured himself takes any profit that would accrue to a buyer if the goods were sold. This allowance is generally fixed at a percentage, say, 10, 15 or 20 per cent., or other percentage, and the Underwriter will then pay the consignee a similar percentage on the insured value of the damaged goods. For example,

Insured value of damaged goods, £100. Allowance 10 per cent. Underwriters pay £10. I hope that I have now explained clearly to you what is meant by Particular Average, and how it should be calculated. I have already referred to the memorandum in the Policy. In the earlier days the franchise mentioned in the memorandum was strictly applied. Now, however, the memorandum is more or less obsolete, the Underwriter specifically indicating the conditions of franchise by special clauses, which differ according to the goods insured. If a Policy contains the words " to pay average " without mention of any franchise, then the franchise in the memorandum applies.

In connection with the phrase in the memorandum warranted free from average under 3 per cent., or 5 per cent. as the case may be, I would mention that this means that the Underwriter does not pay a claim if it is below 3 per cent. or 5 per cent., but if the claim is 3 per cent. or 5 per cent. and over he pays the whole claim. The word " under " does not free him from paying the proportion of the claim under 3 per cent. or 5 per cent., but frees him if the whole claim does not amount to 3 per cent. or 5 per cent. If he wishes to be free of the first 3 per cent. or 5 per cent., he inserts a clause to this effect, as follows: " To pay average in excess of 3 per cent. or 5 per cent. (as the case may be)."

I think it is necessary that I should explain here that some people are under the impression that an F.P.A. policy is of more advantage to the assured when the warranty is broken than a " with average " policy would be. This is due to the fact that they assume that in a " with average " policy the franchise of three or five per cent., as the case may be, is enforceable under all circumstances, whereas under the F.P.A. clause, if the warranty is broken, all average is payable by Underwriters irrespective of percentage. I would, however, point out that if refer-

ence is made to the memorandum it will be seen that it is worded :—

> Corn, fish, &c., are warranted free from average, unless general or the ship be stranded. Sugar, tobacco, &c., are warranted free from average under £5 per cent., and all other goods, also ship and freight are warranted free from average under £3 per cent., unless general or the ship be stranded.

For the purpose of my explanation we can eliminate the words " unless general." The clause therefore reads :—

> Corn, fish, &c., are warranted free from particular average unless the ship be stranded. Sugar, tobacco, &c., are warranted free from average under £5 per cent. (or £3 per cent. as the case may be) unless the ship be stranded.

If the ship be stranded then the warranty of franchise of £5 per cent. or £3 per cent. disappears, and there is no franchise at all in the policy. It might then be said that in a " with average " policy the franchise only disappears when the vessel is stranded, whereas in an F.P.A. policy there is no franchise if the vessel is stranded, sunk or burned or in collision, &c. This is so, but as a matter of fact the franchise in a " with average " policy would by practice disappear if the vessel had been sunk or been burned or if the damage was caused by collision. In any event if either of these accidents happened and damage to the cargo occurred, it is more than probable that the damage would exceed the required franchise. At all events it may be deemed in practice that an F.P.A. policy with the warranty broken is not a better policy than an ordinary " all risk " policy.

A SUGAR AVERAGE CLAUSE.

The various franchise clauses applicable to various goods are numerous, and you must refer to your own office books for information concerning them. I will, however, mention an average clause applying to sugar : " To pay average on each series

of 50 bags following landing numbers," for the purpose of explaining the latter three words, generally indicated by the initial letters f.l.n. As the bags are landed from the steamer at port of discharge they are weighed and numbered. At one time I suppose they were discharged in the same order as they came out of the hold, say, for instance, five sound bags, then one damaged, then four sound, then another damaged, and so on. Discharged in this order, it is probable that the claim on the number of damaged bags among the first 50 bags for instance landed would not reach the franchise. This was all right for the Underwriter, but did not suit the merchant, so that for many years past the damaged bags, as they come up from the hold, are set aside and landed after the sound portion has been discharged. Suppose there are 1000 bags of sugar and 70 are damaged; the 930 are landed first and are followed by the damaged 70. There are, therefore, 18 series of 50 bags—900 landed sound—one series in which there are 30 sound and 20 damaged, and one series of 50 all of which are damaged. If the claim on the 19th series of 50 bags, i.e., 30 sound and 20 damaged, and on the 20th series of 50 bags, all damaged, reaches the franchise, the Underwriter pays the claim.

I should like to deal with other averages but time will not permit, but the same method as I have indicated in the example I have given applies to all average clauses where the franchise is based on a "series."

I will now shortly refer to the method of dealing with damage on one or two special articles.

COTTON AND TOBACCO CLAIMS.

If bales of cotton arrive damaged they are, unless seriously damaged, picked and made merchantable, i.e., the damaged portion is picked off and sold, and the bale is mended, i.e., put into saleable condition. The claim is paid irrespective of percentage,

i.e., whether it is large or small. The Underwriter pays the sound value of the damaged cotton picked off less one-sixth if country damaged or one-third if sea damaged; strictly speaking it should be the insured value, but to save time and trouble and expense of adjustment, the sound value is adopted. The one-sixth or one-third is deducted because it is assumed that the weight of the damaged cotton has been increased to this extent by being damaged by absorption of water. In addition the Underwriter pays the cost of picking and mending, and is credited with the proceeds of the damaged cotton and canvas. As all bales of cotton have to receive some attention after the transit even if sound, the Underwriter is also credited with the ordinary cost of mending. A somewhat similar process is adopted with regard to tobacco. If tobacco is damaged it is "garbled," i.e., the damaged portion is cut off—the Underwriter pays the insured value of the tobacco cut off, and sometimes a depreciation on the portion remaining, because if there is any indication that a hogshead of tobacco or a bale has been "garbled" a buyer may not pay full price; he may want some allowance even though the tobacco itself is absolutely sound. Owing to the heavy duty on all tobacco taken out of bond the damaged tobacco cannot be sold here, but there is a market on the Continent where the duty is not heavy and the Customs, therefore, allow such tobacco to be shipped abroad without payment of duty. The buyers on the Continent, however, only give a small price, say 2d. to 4d. a lb., so that the Underwriter does not get much by way of credit. The Underwriter also, of course, has to pay the cost of garbling, which is a very heavy item in these days.

TEA CLAIM.

The tea clause reads: "Average each 10 chests, 20 half chests, and 40 boxes." The method of dealing with damaged tea is somewhat similar to that adopted for cotton

and tobacco. If a chest is damaged, it is opened and the damaged part removed and the chest is sold as a broken chest with all faults. The claim is adjusted on a Particular Average basis. The sound value is arrived at by taking the weight of the damaged chest in sound condition, and deducting therefrom the proceeds and applying the loss to the insured value in the usual manner.

COCOA.

To ascertain the sound value of a damaged bag of cocoa, three pounds per bag is added to the weight of the damaged bag and the depreciation ascertained in the usual way.

These are some of the principal articles which are dealt with in a special manner when they arrive with damage, and I call attention to them simply as a matter of interest. What is the procedure to be adopted in order to formulate the claim against the Underwriter? The assured advises his Underwriter that his goods have sustained damage; the Underwriter appoints a Surveyor, and if he and the assured cannot agree as to the amount of depreciation the damaged goods must be sold. When this has been done, the assured hands to the Adjuster the Policy, survey report and original invoice and copy of account sales. The Adjuster draws up a statement basing the claim on the terms of the Policy, and adds any charges such as survey fee and his own charge. These documents, with the Adjuster's statement, are handed to the Underwriter either through a broker or by the assured himself. The claims settler examines the documents, and if he finds them in order he passes the claim for settlement and payment.

I will now draw attention to one or two risks which give rise to damage but which are not covered by a Policy on goods unless specially included in the Policy.

SWEAT DAMAGE.

This damage is caused by condensation in the hold of a vessel. A steamer loads her cargo, say, in a tropical climate, and during her voyage passes through a more temperate zone, the waters being cooler act on the ship's sides in the same way as cold does on the windows of a warm room. Condensation is set up, and unless the cargo is properly stowed the water caused by the condensation will damage the cargo.

Damage due to delay. The goods which are liable to natural deterioration, such as fruit, will, if the voyage is prolonged, reach their destination in a damaged condition. Although the delay may be due to a sea peril, yet the damage is not recoverable.

Inherent vice covers the case of damage due to the nature of the article itself, such as the instance I have just mentioned, i.e., fruit becoming damaged owing to natural decay.

PILFERAGE.

With regard to the question of theft, i.e., theft or pilferage as we understand the word, in the body of the policy you will find that one of the risks mentioned is "thieves," and you might quite justly conclude therefrom that theft or pilferage was therefore covered. This is not so. The word "thieves" in the policy means robbery with violence, i.e., by bands of robbers or wholesale looting done openly. It does not cover pilferage, which is clandestine theft—theft done under cover and by stealth. That the word "thieves" should not cover both classes of theft may appear curious, but, so far as marine insurance is concerned, the distinction is well established, and it is confirmed by the Marine Insurance Act of 1906. The risk of sweat damage is sometimes, and the risk of pilferage frequently, now covered specifically in the policy.

I have been asked to explain another risk which is being covered rather extensively now, i.e., the risk of non-delivery. Non-delivery, as the words imply, means that certain bales or cases of goods, on arrival of the steamer at destination, cannot be found, and consequently cannot be delivered. That is, they are short delivered, or delivered short. It differs from pilferage, inasmuch as in pilferage the case is delivered short of its contents, while in non-delivery the case is not delivered at all. In pre-war times shipowners, under the Bill of Lading, admitted liability up to a certain value fixed in the Bill of Lading for non-delivery, but as these losses have been rather extensive of late, some claim that non-delivery is due to pilferage, and pilferage is one of the risks from which they are exempted by the terms of the Bill of Lading. Underwriters do not admit this. Non-delivery may be due to goods being carried to the wrong port, and also to other circumstances. The two risks are distinct, notwithstanding the fact that non-delivery may be due to pilferage. During the war I heard of a case where several bales were short delivered. They could not be traced, and the only conclusion regarding the loss was that the goods must have been shipped by a subsequent steamer, which had been torpedoed. As you all probably know, Underwriters insert in their policies a clause to the effect that they only pay 75 per cent. of losses due to pilferage and to non-delivery, and that they are entitled to receive 75 per cent. of any sum the assured may recover from the carriers.

These remarks bring my lecture on Particular Average on goods to a conclusion.

SECOND LECTURE.

Delivered December 10, 1920.

GENERAL AVERAGE.

York-Antwerp Rules.

AVERAGE ADJUSTMENT.

General Average is not an incident that arises out of insurance—insurance is quite a modern institution compared with General Average. General Average is the natural outcome of the conveyance of goods by sea. When for some cause the ship and her cargo were in peril, and in order to save them from the consequence of such peril, it was deemed advisable to make a sacrifice of part of the ship or cargo, the question naturally arose why should the shipowner, or the owner of the cargo whose goods had been sacrificed, bear a loss which was incurred for the benefit of others besides themselves. The difficulty was solved by making the parties whose interest was saved contribute to the loss of the parties whose interest had been sacrificed.

IMPLIED SACRIFICE.

General Average implies a sacrifice. Now a sacrifice implies an act done for the benefit of others. They who benefit by the sacrifice should, in common fairness, lighten the burden of those on whom the loss by sacrifice falls. A General Average loss must be a loss of something of value, otherwise there is no sacrifice. For instance, to throw overboard a bale of burning jute is not sacrifice. It would not have been thrown overboard if the fire could have been extinguished;

it would have been totally destroyed by fire, therefore it is no loss to throw it overboard.

General Average, like charity, covereth a multitude of sins, and I have known cases where General Average sacrifice has included articles the loss of which might be traced to the voluntary act of some of the ship's crew. I once heard of a case where a Greek Captain, who probably had had his watch stolen, stated in his log that he had thrown his watch overboard to lighten the vessel. I have been told that in some countries, before a sacrifice of cargo is allowed to be made, there must be a sacrifice of some article of the ship, and on one occasion a Captain, considering it necessary to jettison cargo, first of all threw overboard a sardine tin opener so as to comply strictly with the law that he must sacrifice part of the ship's material first.

As a writer put the matter: "The object of this contribution is the repayment of some expenses incurred or the restitution of something valuable sacrificed for the benefit of the whole." This definition of a very reasonable principle being kept in view, will be a key to the whole subject. We can bring to its test any charges undertaken or any loss sustained in connection with a loaded ship. Let us put this statement to the test. The cargo of a vessel is on fire; to extinguish the fire, water is poured into the hold on to the cargo which is on fire. This water, however, damages sound cargo—in other words, the water used to extinguish the fire in the burning cargo also damages the cargo which is not on fire. Was the damage to the sound cargo a sacrifice incurred for the benefit of the whole? Undoubtedly. The pouring of water into the hold is a voluntary act. It is quite evident that the effects of the water could not be confined to the burning cargo, but would also damage other cargo, therefore the damage to the other cargo is a sacrifice incurred for the benefit of all concerned in the adventure, and forms the subject of a General Average contribution.

CARGO JETTISON.

The earliest known form of General Average sacrifice is jettison, which in the words of a well-known writer is "the casting out of the ship, when in great danger, a portion of her cargo or a part of her own stores, materials, &c." The cutting away of a mast to save the vessel and her cargo is another early form of General Average. Another form of General Average sacrifice, to which I have already referred, is the damage done to cargo by the use of water or steam to extinguish a fire. An allowance for water damage in General Average, however, is only admissible on that part of the damaged cargo which has not been in actual contact with fire. I have already mentioned the case of jettison of a bale of jute on fire and pointed out the reasons why such a jettison would not be acknowledged as a General Average sacrifice, and the same principle applies to damage done by water. The goods actually on fire are the cause of the use of the water, and it would be unreasonable to make good in general average damage by water to such goods.

Another subject of General Average is the expenses paid for assistance rendered by third parties to the vessel when in danger, such as towing a disabled vessel into port. Such expenses may either be General Average or salvage charges. The distinction is not too clear, but for the moment we will call them General Average.

PORT OF REFUGE EXPENSES.

A further item is port of refuge expenses. Supposing a vessel at sea meets with an accident and needs repairs to enable the voyage to be continued, or supposing she is disabled and taken in tow. She proceeds to the nearest suitable port; such port is called a "port of refuge," and the expenses of entering such port being incurred for the general safety form the subject of General Average.

One other example of General Average. A vessel meets with heavy weather and is delayed thereby and her stock of coal runs short. In order to keep the fires going and so maintain steaming power ship's material, and sometimes even part of the cargo, is used as fuel; the value of the materials and/or cargo so used would be made good in General Average, less credit for value of coal that would have been used had it been on board. It must be shown, however, that the vessel, when she left port, had on board sufficient coal to take her to the next coaling port.

The introduction of steamships gave rise to other forms of General Average sacrifice, such as the damage done to machinery in forcing the vessel off the ground, provided always that when on the ground she was in peril—i.e., in danger of running serious risk if she remained aground. If a vessel went aground, say, at low tide, and would have come off the ground when the tide rose, she would not probably be held to be in danger, and, therefore, if the engines were worked and sustained damage such damage would not be a sacrifice.

THE YORK-ANTWERP RULES.

The law as to what is and what is not General Average differs in different countries, but in the main the items I have mentioned are practically accepted as General Average in nearly all countries. With a view to bringing about uniformity in the law, an Association was formed under the title of "The Association for the Reform and Codification of the Laws of Nations." This Association held a meeting at York in 1864 and another meeting at Antwerp in 1877, when a code of Rules was adopted for the stating of General Average, which were known as the York-Antwerp Rules. Later on in 1890 the Association again met in Liverpool, when the code was revised, and the Rules known as the York-Antwerp Rules 1890 were adopted. The adjustment

of General Average as between the ship-owner and the owner of cargo depends upon the clause in the Bill of Lading dealing with the matter, but it will be found that in most Bills of Lading in use at the present time it is stated that General Average is to be dealt with on the basis of York-Antwerp Rules.

I would like you all to obtain a copy of the York-Antwerp Rules, as a study of the same will enable you to understand this subject of General Average much more fully than I can explain it in the short time at my disposal. I will, however, deal with a few of its clauses.

The General Average clause in the Institute Cargo Clauses reads as follows :—

> General Average and Salvage Charges payable according to Foreign Statement or per York-Antwerp Rules if in accordance with the contract of affreightment.

If, therefore, the Bill of Lading or Charter-party contains provision for York-Antwerp Rules, then these Rules are the basis for contribution to General Average. If the Bill of Lading or Charter-party does not mention the rules, then the General Average is based on the law existing at the port of destination. In some cases the Bill of Lading may provide for General Average in accordance with the law of the country to which the ship belongs, in which case complications may arise between the cargo owners and their Underwriters, as presumably foreign statements would be held to mean a foreign statement at port of destination.

I trust that I have clearly conveyed to you the meaning of General Average, and now I will explain the basis on which the various parties pay their share of the General Average sacrifice or expenditure.

I wish you to bear in mind that the values over which the General Average is apportioned are the values at the port at which

the voyage terminates. The shipowner pays on the value of the ship, if sound on the sound value, if damaged on the damaged value. To assess this value the services of a ship valuer are often required. The shipowner also pays the share of General Average attaching to the freight at his risk at the time of the General Average Act. Freight, as you are all aware, is the money paid by the cargo owner to the shipowner for the carriage of his goods. The value of freight for contribution purposes is the gross freight, less expenses incurred after the General Average Act, such as crew's wages, harbour charges, &c. The cargo owners pay on the market value of their goods less freight and landing charges. The reasons for these deductions from freight and from cargo value is that the General Average has not prevented the incurring of these charges, but, on the other hand, has caused them to be incurred. In other words, if the vessel had been lost and had not been saved by the General Average Act, the shipowner would not have had to pay crew's wages and harbour expenses, and the cargo owner would not have had to pay freight and landing charges. Moreover, if the shipowner has to pay on his freight, and the cargo owner had to include freight in the value of his cargo, freight would be contributing twice over. If the shipowner receives his freight in advance, i.e., if the cargo owner pays freight at port of shipment and not at port of destination, then freight becomes part of the value of the goods and the General Average thereon is paid by the cargo owner. The amounts admitted in General Average for sacrific of ship, cargo or freight have also to bear their proportion of General Average contribution, as if this is not done, the owner of the sacrificed property would be in a better position than the owner whose property had not been sacrificed, as the latter would be called upon to pay his share of the General Average, while the former would receive the value of his cargo in full.

AN EXAMPLE.

I will now give you an example of a General Average contribution. The vessel A with a cargo of jute has been aground. The engines are worked to get her off, but unsuccessfully. It is decided to lighten the vessel. The vessel being provided with wireless, advises the nearest Lloyd's Agent and asks for lighters and a tug to be sent. The lighters arrive and part of the cargo is discharged and the lighters are towed into the nearest port for safety, because it would not be advisable to allow them to remain alongside for fear of bad weather. The engines are again worked, and with the assistance of the tugs the vessel is got off and proceeds into port. Surveyors are called in to inspect the vessel. Some slight repairs are necessary; these are easily effected, the vessel reloads her cargo and then proceeds on her voyage. The Bill of Lading provides for York-Antwerp rules.

When the vessel arrives at the port of discharge the owners place the accounts in the hands of the average adjuster, who makes a rough calculation of the probable amount of General Average. The following is an estimate of the expenses incurred :—

Costs of hire of lighters	£500
Costs of discharging cargo	500
Costs of reloading cargo	500
Costs of tugs	2,000
Expenses of entering port	50
Expenses of leaving port	50
Wages and provisions during stay in port	100
Then there may have been damage to the cargo in discharge and reloading, and perhaps damage to the engines in getting off. These we estimate at	500
	£4,200

Estimate of value.

The value of the ship is fixed at (in sound condition)	£50,000
Freight, less crews' wages and harbour expenses	5,000
Cargo	45,000
	£100,000

The adjuster estimates that the General Average will amount to 5 per cent.

The shipowner thereupon, before he delivers up the cargo to the cargo owners, demands from each of them a deposit of 5 per cent. on the value of their shipments. A deposit account is opened, generally in the names of the adjusters and the shipowners, and these deposits are placed to the credit of this account. Sometimes in lieu of taking a deposit the shipowner is satisfied to accept a guarantee from the cargo owners to pay any General Average contribution that may be found due on their cargo. The usual form of guarantee is that known as Lloyd's Average Bond, by which the owners of the cargo undertake to pay any contribution that may be found due in respect of their shipments and to pay a deposit on account if they should be called upon to do so. The shipowner frequently insists upon this average bond being also signed by the underwriter, so that in the event of the failure of the cargo owner before the General Average statement is completed, he has a right of claiming direct from the underwriter.

If, during the process of discharging or reloading, the cargo, or any part of it, has become damaged, then such damage is allowable in General Average, and when the claim is presented to the underwriter for settlement, he notifies the average adjuster that he has paid the claim and requests that any amount made good in respect of such damage should be placed to his credit in the General Average adjustment. When refunding General Average deposits, the underwriters generally notify the adjuster,

so that if, on completion of the statement, it should transpire that the deposit collected is in excess of the amount actually required, the underwriter will be credited in the statement with any over-payment.

PREPARATION OF STATEMENTS.

Statements sometimes take a very long time in preparation, and I know of one case in which there are about 1500 different shipments of cargo owned by 1500 different owners in which many of the shipments are damaged, and which damage will have to be made good in General Average. I am told by the adjuster that the statement will not be issued for about 2½ years, and will occupy the attention, during the whole of that time, of eight of his clerks. This is, of course, an unusually complicated General Average. It is to be borne in mind that the adjuster has to scrutinise carefully every claim put forward for damage to be made good in General Average, and see that the credit for any such sums is properly given to the right persons.

When the adjustment is completed and shows the General Average contribution does not reach, in the case above-mentioned, five per cent., then the persons who have paid the deposits have refunded to them, out of the deposit account, the excess payments made by them, and the balance of the deposit account is used for the payment of the various expenses that have been incurred for General Average purposes.

If there has been no deposit paid then the shipowner, when the statement is completed, will call upon the consignee to honour his bond and pay the General Average contribution on his goods. The assured, having paid General Average contribution, presents his claim to the underwriter for settlement. The underwriter's liability will depend upon whether or not the goods are fully insured. If the contributory value is in excess of the insured value, then the

underwriter only pays his *pro rata* share; if the goods have been damaged and the underwriter has been called upon to pay Particular Average, then, in estimating the amount for which he is liable for General Average, he is entitled to deduct from the insured value the sum which he has paid for Particular Average, and his liability for General Average will be based on the insured value less the Particular Average.

Say, for example, the contributory value of goods is £2000 and the General Average contribution is £20, and the goods are insured for £2000. The goods, however, have been damaged and the underwriter, say, has paid for Particular Average £200, then the liability of the underwriter will be for one per cent. on the insured value of £2000 less Particular Average £200, equal to £1800, viz. £18. The owner of the cargo would have to bear the difference between this £18 and the amount which he had paid to the shipowner.

THIRD LECTURE.

Delivered January 14, 1921.

SALVAGE CHARGES.

Sue and Labour Charges.

F.C. AND S. CLAUSE.

In my last lecture I dealt with the subject of General Average, indicating what is meant by a General Average Loss, such as jettison of cargo, damage to engines in getting a vessel off the ground, damage by water used to extinguish a fire, or the cutting away of ship's materials, such as a mast to ease the vessel when in a dangerous position, and I also dealt with general average expenditure, such as the expenses incurred in discharging cargo to lighten the vessel and cost of reloading, and expenses incurred through putting into a port of refuge. I explained that such damages and expenses, being incurred for the common safety of all interested in the adventure, must be borne rateably by all the parties concerned, each in proportion to the values they have at stake. This evening I will deal with the question of salvage charges which, although of the like character to general average expenses, yet differs so far as regards the basis on which they are recoverable from the interested parties.

LIABILITY OF INSURER.

The Marine Insurance Act describes salvage charges as follows:—

Sect. 65, para. 1:

Subject to any express provisions in the Policy, salvage charges incurred in pre-

venting a loss by perils insured against may be recovered as a loss by those perils.

Para. 2:

Salvage charges means the charges recoverable under Maritime Law by a salvor independent of contract. They do not include the expenses of services in the nature of salvage rendered by the assured or his agents or any person employed for hire by them for the purpose of averting a peril insured against. Such expenses may be recovered as particular charges or as a general average loss, according to the circumstances under which they were incurred.

It must be particularly noticed that in para. 1, the insurer is only liable for salvage charges incurred in preventing a loss by perils insured against. For instance, if a vessel was insured against the risk of collision only, the Underwriters would not be liable for salvage charges or even general average arising out of the stranding of the vessel, nor for salvage or general average occasioned by a war peril, if the war risk was excluded from the policy. In para. 2, the difference between a general average and salvage is defined, for it is laid down in this paragraph that salvage charges are charges incurred independently of contract. General average arises out of the contract between the shipowner and shipper for carriage of his goods. Salvage charges are charges claimable by third parties, i.e., the salvors, not under any contract, but under Maritime Law. For example: Supposing a vessel is at sea and is in trouble owing to the machinery being disabled, and is in great danger and sends out a S.O.S. signal to vessels in the neighbourhood for assistance. A vessel receiving her signal hurries to her assistance and tows her into port. This is salvage, pure and simple. On the other hand, supposing the vessel is ashore, and the Master is able, through Lloyd's Agents or other sources, to get in touch with the owner or his agents, and these latter make arrangements with a

tugowner to send a tug to the help of his steamer, and they arrange to pay him so much a day for the services of the tug. These expenses being incurred under contract between the shipowner and tug, are not salvage charges, but charges of the nature of General Average.

AN IMPORTANT DIFFERENCE.

There is, further, this important difference between these two classes of charges: Where, in the first-mentioned case, the vessel reaches port, the Master of the salving vessel is entitled to claim salvage on the value of the ship and cargo at the port where his services end, and, further, he is entitled to have a lien on the ship and cargo at that port, and he will not release the vessel until he has received from the owner of the salved vessel a guarantee or bond or some form of security by which he will be able to collect any salvage money that subsequently he may be entitled to receive. The salvor is entited to claim in local Courts compensation for his services. For instance, supposing an English vessel tows an English ship into a French port. The owners of the salving steamer can have their claim adjudicated in the French Courts. It is becoming, however, the practice in such a case as this for the owner of the salving vessel to arrange with the owner of the salved ship to agree to have the claim settled in the English Courts or by arbitration, but, of course, the owner of the salving vessel will require security before releasing the steamer which has been salved. This security is often arranged between the two owners on this side, and if the matter is to be settled by arbitration, Lloyd's Salvage Agreement is often signed. Under this Agreement it is agreed that the Committee of Lloyd's shall appoint the Arbitrators. The Arbitrators selected by Lloyd's are generally well-known K.C.'s engaged at the Admiralty Bar. In due course, both sides, through their legal representatives, appear before the Arbitrators to state their case, and after consideration the

Arbitrators issue their award. In deciding the sum to be paid, the Arbitrators take into account three items:—(1) The imminence of the peril from which the vessel has been saved. (2) The value of the property saved. (3) The value of the property engaged in the salving operations and risk run by the salving vessel. The example of salvage which I have given you, as I have already said, is a case of pure salvage; there is no contract for salvage—the steamer is, in effect, picked up at sea. I call this a " pure " salvage for this reason, that there can be no question but that such a salvage complies strictly with the rule I have quoted from the Marine Insurance Act. In the next example it is open to question whether it is strictly a case of " Salvage Charges," although it is commonly so called. A vessel is badly stranded and efforts to rescue her by local means are unsuccessful. The owner advises his Underwriters, and they, in their turn, place the matter in the hands of the Salvage Association. The Salvage Association, like Lloyd's, has its ramifications all over the world. It possesses branch offices at Cardiff and New York, and it has also an American Lakes Department. It is in touch with all the Salvage Companies, and when a casualty occurs and the matter is placed in their hands, they at once get in touch with their Agents or Lloyd's Agent and arrange for one of the Salvage Companies to proceed to the scene of the casualty. If the case is a difficult one they send one of their own Officers to the spot to watch the operations, and generally to protect Underwriters' interests. The terms on which these Salvors generally act is that known as the " no cure no pay " principle, i.e., no payment is made to the Salvor unless the salvage operations are successful and the vessel is saved. Lloyd's Salvage Agreement is generally accepted, although it is frequently agreed that Sir J. Lowrey, the well-known Secretary of the Salvage Association, is to decide what sum should be paid to the salvors.

CONSIDERATIONS FOR ARBITRATOR.

In estimating the sum to be paid, the Arbitrator has to bear in mind, in addition to the factors I have already mentioned, that it is a "no cure no pay" contract; in other words, the salvor has run the risk of heavy expenses, which he would have had to bear himself if the operations had not been successful. If the salvor runs the risk of losing heavily if unsuccessful, he naturally expects to receive a handsome remuneration if successful, for he has risked much and will expect much. It sometimes happens that after a time the salvor comes to the conclusion that it is impossible to save the ship, and abandons the operations. A new contract is then entered into for stripping the vessel, i.e., taking off the vessel all salvable articles, such as winches, &c. A very important difference between general average and salvage lies in the fact that while general average is based on values at place of termination of the voyage, the values for salvage are based on values at the place where the services of the salvors terminate.

The Sue and Labour charges provision reads as follows:—

> And in case of any loss or Misfortune, it shall be lawful to the Assureds, their Factors, Servants, and Assigns, to sue, labour and travel for, in and about the Defence, Safeguard, and Recovery of the said goods, Merchandizes, and Ship or Vessel, &c., or any part thereof, without prejudice to this assurance; To the Charges whereof the said Company will contribute, according to the Rate and Quantity of the sum herein assured.

These are of a like nature to general average charges, but differ in this respect. In General Average there are two or more interests, otherwise the average could not be general. General Average may consist of sacrifice as well as expenditure. In Salvage there is no contract. In Sue and Labour there is a contract, and it is a contract for saving specific interests, i.e., it

might be that the vessel is in ballast, or, even if it is a case of a vessel with cargo, there might be a separate contract for saving the cargo and one for saving the ship. There is one fundamental difference between General Average charges and Salvage charges and Sue and Labour charges, and that is that Sue and Labour charges are paid by the Underwriter in full, even if the cargo or ship is under-insured, while in General Average or Salvage, if the value of the goods or ship is in excess of the value for which they are insured, the Underwriter only pays his *pro rata* share :— Market value of ship, £15,000; General Average, £150; insured value, £10,000, pays £100—and the same with goods. If, instead of General Average, the charges were Sue and Labour, the Underwriters would pay £150.

INTERESTING EXAMPLES.

I once had a case before me where a vessel was ashore and badly damaged. The owner made a contract for a salvor to endeavour to save the ship. The salvor was successful, and we had to pay 100 per cent. for repairing the ship and 15 per cent. for charges under the Sue and Labour clause. The same principle applies if the Suing and Labouring are unsuccessful; these expenses, if properly incurred, would have to be paid in addition to a total loss. Supposing a vessel were ashore and no salvor would attempt salvage on a "no cure no pay" contract, but offered to send a tug in consideration of being paid so much per day. These expenses, being under contract, would have to be paid even if the vessel were not saved, and would be recoverable from the Underwriters in addition to the total loss. The thought naturally arises, Why should Underwriters pay Sue and Labour charges on a different basis to Salvage and General Average Charges? The reply is to be found in the clause itself, which reads :—

> . . . To the charges whereof the said Company will contribute, according to the rate and quantity of the sum herein insured. . . . .

and the view is confirmed by the well-known case of Aitchison v. Lorle, decided in 1876. This anomaly is rectified to some extent in the Institute Time Clauses, which provide for a division of these expenses in cases where the ship is not fully insured.

Sir Joseph Lowrey has given me a list of the various salvage companies who have at one time or another acted for the Salvage Association. The list comprises the names of some fifty salvage companies who operate in their various spheres in different parts of the world. In England we have nearly twenty salvage companies operating off the coasts of the British Isles. The well-known Neptun Salvage Company, of Stockholm, one of the chief companies, operates in the Baltic, and the Svitzer Company, of Copenhagen, operates in the Mediterranean, while the powerful Merritt's Salvage Company operates in American waters off the Atlantic Coast of the United States of America.

MERITORIOUS SALVAGE.

Many have been the highly meritorious salvages. To enumerate a few I would mention the P. & O. steamer *Oceana* sunk after collision off Beachy Head, where nearly £760,000 of gold and silver were recovered by divers. The R. M. S. P. steamer *Agadir* stranded off Mazagan, North Africa. The salvors refused to attempt salvage on the "no cure no pay" terms, and arrangements were made for the Liverpool Salvage Association to send their steamer *Linnet*, which vessel subsequently floated the *Agadir*. The steamer *Milwaukee* stranded off the coast. In order to salve her it was found necessary to cut off her bows. This was done by explosives. The remainder of the vessel was towed off, and a new bow was fitted to her in dry dock. I might add that the Salvage Association and the Liverpool Salvage Association are Underwriters' associations and are not commercial concerns, and do not work for profits. The management of these two Associations and

also that of the Glasgow Salvage Association is in the hands of Committees of Underwriters, the Officers of all three Associations being persons of well-known ability. The Liverpool Salvage Association owns salvage steamers, while the Salvage Association content themselves by simply owning a certain quantity of salvage plant.

This concludes my remarks regarding General Average, Salvage, and Sue and Labour charges, which remarks are somewhat limited owing to time.

THE F.C. AND S. CLAUSE.

The F.C. and S. Clause reads as follows:

> Warranted free of capture, seizure, arrest, restraint, or detainment, and the consequences thereof or of any attempt thereat (piracy excepted) and also from all consequences of hostilities or warlike operations whether before or after declaration of war.

As I have already explained, the words "warranted free of" mean that the policy or the Underwriter is not liable to pay for any loss arising out of the risks from which he is "warranted free of." If this clause is in the policy, the policy is said to be free of "war risk." The better view to take, however, is to say that with this clause in the policy the Underwriter is free of any claims arising from risks mentioned in the policy if such risks arise from capture, seizure or detention, &c. Some may imagine that the deletion of this clause implies some additional risk which would not exist if the clause was not in the policy at all. They might think that the deletion of the clause makes the Underwriter responsible for all risks arising out of hostilities. This is not so; you cannot exclude from the policy anything which is not contained therein, and, consequently, the deletion of the clause has the same effect as if a policy were issued which did not contain the clause. Let me explain. Among the

risks enumerated in the policy are men-of-war. These are eminently war risks and would be excluded by the F.C. and S. Clause. There are, however, other risks mentioned in the policy, such as Jettison, Fire, Strandings. If losses arising from these risks were occasioned by acts of hostilities, these would also be excluded by the F.C. and S. Clause. In order to make such losses war losses, they must have been caused by the imminence of the peril of warlike operations.

"CONSEQUENCES" CONTROVERSY.

Supposing a vessel had gold on board and was being pursued by enemy craft and the gold was thrown overboard to avoid its being captured. That jettison would be a war loss. Or supposing a ship was set on fire by a shell from an enemy cruiser, that fire would be a war risk; or if a vessel was being chased by a submarine and was run aground, that grounding would be a war risk. There has been more controversy over the effect of the word "consequences" in this clause than over any other clause at any other time. Take for example losses due to collision between two vessels sailing without lights. Acting under Admiralty instructions, a breach of which would involve a Master in severe penalties, vessels had to proceed at nights without showing lights and solely in consequence thereof many collisions occurred and vessels were lost thereby. The sailing without lights was without doubt due to the existence of war, and was for the purpose of avoiding, if possible, attacks by submarines. The loss of a vessel sunk by a submarine is, of course, a war loss, and would be recoverable under a policy as a loss caused by "men of war." The sailing without lights is merely taking precautions to avoid loss by "men of war." Should not, therefore, a loss arising solely by reasons of the precautions so taken be equally classed as a loss arising out of the consequences of hostilities? I suppose the man in the street would at once say "Yes," and perhaps the

majority of people who are acquainted with Marine Insurance matters were of the same opinion. I, myself, thought so. They were wrong. The House of Lords has set all doubts at rest by deciding in the case of the *Petersham* that such a collision is a Marine risk, and not a "war" risk. The reason being that the loss was not due to a warlike operation, the sailing without lights being merely a preventive action against a possible hostile operation, and not the result of it. The result might possibly be different if there was evidence that a submarine was actually following.

WAR CASES.

This is merely one example of the many interesting cases affecting Marine insurance arising out of the war. I might add here that the French Courts on the whole are inclined to regard such a loss as a "war" loss. Now it is commonly supposed that the F.C. and S. Clause merely excludes from the policy only losses arising out of war operations. This is not so. The clause commences "warranted free of capture, seizure and detention." These three risks need not necessarily arise out of warlike operations. If it was intended to limit the clause to warlike operations it would not be necessary to mention these specific risks, for such losses could be recovered under the words "warlike operations." A vessel or her cargo might be seized for illicit trading, i.e., smuggling. Such a seizure would not be a warlike operation, but the loss would nevertheless not be recoverable because the policy is warranted free from seizure. This was decided in the case of Cory v. Burr in 1883. The policy contains the words "Restraint of Princes." Now "Restraint of Princes" need not necessarily be the outcome of a warlike operation. In Miller v. Law Accident Insurance Society, Ltd. (1903), where a vessel having on board a shipment of cattle arrived at Buenos Ayres but the authorities, owing to an outbreak of disease, refused to allow the cattle to

be landed, and they were transhipped to another steamer and were carried on to Montevideo, the assured claimed that this was a loss covered by a Marine policy including the F.C. and S. Clause, but the Court held that the loss was due to a risk of the nature of "Restraint of Princes," and that "Restraint of Princes" was one of the risks excluded from the F.C. and S. Clause.

SAILING WITHOUT LIGHTS.

It is necessary, therefore, to bear in mind that the F.C. and S. Clause does no more than exclude from the Policy losses arising from risks mentioned in the Policy when such losses are the consequence of hostilities or warlike operations, and also, of course, losses arising from capture, seizure or detention, &c. As an example of this I would quote another case of collision due to sailing without lights. The *Saint Oswald* was engaged by the Admiralty in the conveyance of troops, while the *Suffren* was a man of war, and was naturally also occupied on warlike operations. The *Saint Oswald* was sunk, and the Courts held that the loss was recoverable as a "war" risk. There is in the opinion of the Courts a vital difference between this case and the *Petersham*, and that difference lies in the fact that both the *Saint Oswald* and the *Suffren* were on warlike operations, while in the *Petersham* case the two vessels were merely engaged in an ordinary commercial enterprise. As the *Saint Oswald* and the *Suffren* were both engaged in warlike operations, and for the purpose of carrying out those operations it was necessary to sail without lights, then the collision being due to the sailing without lights, and the sailing without lights being part of the warlike operations, the consequential loss of the vessel was therefore a loss due to the consequences of warlike operations. While the Courts have made the distinction between the two cases, and have therefore established the law on the point, yet there is considerable diversity of opinion as to the correctness of the

distinction so made. The principles I have enumerated with regard to the application of the F.C. and S. Clause apply equally to what is known as the strikes clause, which reads as follows :—

> Warranted free of loss or damage caused by strikers locked out workmen or persons taking part in labour disturbances or riots or civil commotions.

This clause excludes from the Policy any losses arising from risks mentioned in the Policy if such losses are due to strikes, riots, &c. The deletion of the clause does not import into the Policy any additional risks to those enumerated in the Policy. For instance, damage done by fire to goods by the action of strikers would be excluded if the strike clause were in the Policy, but the deletion of the clause would not render Underwriters liable for damage by strikers unless such damage were due to one of the risks mentioned in the Policy.

POSITION OF UNDERWRITER.

I repeat that you cannot exclude from the policy something which does not exist therein. The risks covered by the policy are enumerated therein, and the deletion of the strikes clause does not add to the risks specified in the policy. The inclusion of the strikes clause means that if any of these risks are the work of strikers, then the policy does not pay losses arising therefrom. To make the matter quite clear, let us suppose that a policy is issued covering the risk of loss by fire, and the " strikes " clause is in the policy. The policy would cover all risks by fire except those caused by " strikers, locked-out workmen, &c." If the " strike " clause is deleted you have simply a policy covering the risk of fire and nothing more. I have rather laboured this point because it is one of great importance, and there is an impression that if an additional premium is paid to cancel the strikes clause the Underwriter is liable for losses arising from the action of strikers, however caused, which is not the case.

The British and Allied Capture Clause can be dealt with very shortly. The clause reads as follows:

> But this policy is warranted free of any claim arising from capture, seizure, arrest, restraint, or detainment, except by the enemies of Great Britain or by the enemies of the country to which the Assured or the ship belongs.

The introduction of the clause was due to an effort to make the blockade against Germany effective. Of course, no Britisher would attempt to insure goods to Germany, but frequently goods were shipped to Neutral countries, ostensibly for consumption in those countries, but which were, in reality, shipped to those countries merely for forwarding to Germany. This was specially the case of goods shipped to Holland, Sweden, &c. The English market being the paramount insurance market of the world, such goods, to a large extent, were insured through the agencies of English companies, and if the goods happened to be captured by any of the Allied countries the holders of such policies could proceed against the agents of the English companies in the countries where the agencies were established, and could claim a total loss. In order to deprive, as far as possible, the agents of Germany from facilities for insurance, this clause was inserted in British policies, so that in Neutral or Allied countries the holder of such a policy could not recover for goods captured or seized by British or Allied authorities.

FOURTH LECTURE.

Delivered February 8, 1921.

HULL POLICIES.

CLAUSES RELATING THERETO.

In dealing with claims on hull policies, I propose to base my remarks for the greater part on the usual form of Institute Time Clauses. These clauses are those most common in use. Some owners use their own particular clauses, which, however, include many of the clauses contained in the Institute form, and do not differ much from the Institute Time Clauses except perhaps in regard to the franchise clause. In considering claims on hull policies one must bear in mind that ships are not like produce and goods. The latter are intended for sale, while ships are built for the purpose of transporting the produce and goods and so earning freight for their owners. Therefore, in calculating a claim for particular average on ship there is no comparison between the sound and damaged values for ascertaining the depreciation. A particular average on ship is the cost of repairing the damage sustained. In the absence of any clause in the policy regarding average, claims on ships would be subject to the memorandum which reads as follows :—

> The ship and freight are warranted free from average under three pounds per cent. unless general or the ship be stranded.

The memorandum is, however, now obsolete. The policy always contains a special average, or, as one may call it, a special franchise clause. The average or franchise clause in the Institute Time Clauses reads as follows :—

Warranted free from particular average under 3 per cent. but nevertheless when the vessel shall have been stranded, sunk, on fire, or in collision with any other ship or vessel, Underwriters shall pay the damage occasioned thereby, and the expense of sighting the bottom after stranding shall be paid, if reasonably incurred, even if no damage be found.

A short explanation regarding the words "stranded, sunk, on fire or in collision" is perhaps desirable.

MEANING OF "STRANDED."

The literal meaning of the word "stranded" is that the vessel must be cast on the strand or shore, but a vessel is equally said to be stranded if she accidentally grounds on a boulder or wreck or some other obstruction. It is quite immaterial whether or not the vessel sustains much, little or even no damage; such would be a strand within the meaning of the word in the policy. A mere touching of the obstruction would not be a strand, the vessel must remain on the obstruction for an appreciable time—a mere "touch and go" is not a strand. No definite period can be fixed. In one case a vessel remained a minute and a half—that was held not to be a strand. On the other hand, if a vessel grounds in her berth where it is usual for vessels to ground at low water and float with the rising tide, such grounding, being usual and not accidental, would not be deemed to be a strand. Clause 15 of the Institute Time Clauses provides that:—

Grounding in the Panama Canal, Suez Canal or in the Manchester Ship Canal or its connections, or in the River Mersey above Rock Ferry Slip, or in the River Plate (above Buenos Ayres) or its tributaries, or in the Danube, Demerara, or Bilbao River, or on the Yenikale or Bilbao Bar, shall not be deemed to be a stranding.

The reason for the insertion of this clause is that vessels frequently ground in these localities because of the lowness of the water or the narrow channel ways. It is not, of course, intended that they should ground, but a very slight deviation may take a vessel out of the channel and cause her to ground. If Clause 15 is not in the policy then the grounding in the localities mentioned would be subject to ordinary test to ascertain whether such were "strandings." The word "sunk" means an actual immersion of the vessel in the water, not necessarily a resting on the bed of the ocean, for a vessel laden with timber might sink and still float on her cargo partly submerged. The word "fire" needs no explanation. Underwriters pay for all damage caused by fire. If instead of "fire" the word "burnt" appears in an average clause on ship, the burning must be of a substantial character with an actual destruction of part of the ship herself. The Glenlivet Steamship Company v. Titcombe. (Court of Appeal, 1893.)

SUBTLETIES OF COLLISION LAW.

In the clause quoted, the word "collision" is followed by the words "with any other ship or vessel." The addition of these words is perhaps unnecessary, because in a Marine Insurance policy the word "collision" when not qualified means collision with another ship or vessel. (Richardson v. Burrows.) It does not include collision with a pier, quay or such like stationary object. A vessel within the meaning of this clause need not necessarily be a body used solely for navigation, such as barges, ships, &c., but rather a body that can be navigated—for instance, an elevator used in discharging or loading cargo may be a vessel if it is not a fixed object, but one that can be moved from one place in a harbour to another. Also a vessel which has been sunk may be deemed to be a vessel if it can be shown that she could have been raised and repaired. (Chandler v. Blogg, 1897.) A case

recently came before me where a steamer collided with a steamer which had been sunk and damaged her. The sunken steamer was, at the time, in the hands of the salvors, who helped to raise her, and it was claimed that the collision had caused such extra damage to the sunken steamer that the salvors gave up all hope of saving the vessel. The Courts, after hearing expert advice, came to the conclusion that the damage done by the second collision did not prevent the saving of the vessel as she was unsalvable before the collision took place. This second collision was not, therefore, a collision with a ship but with a wreck, and would not have been a collision within the meaning of the word as used in the policy. If, on the other hand, the Courts had come to the conclusion that the vessel could have been raised as a vessel, the collision would have come within the definition of a "collision." Contact with a ship's cable would be a collision because the cable is considered part of the ship. A vessel was moored away from a quay with her mooring ropes carried to the bollards on the quay. A tug passing between the quay and the vessel had her funnel damaged by coming into contact with the mooring ropes. This was a collision within the meaning of the clause. In the clause I have quoted above you will notice that the Underwriter agrees to pay for damage caused by stranding, &c., even if it does not amount to 3 per cent., and he will pay the cost of drydocking the vessel after stranding for examination, if reasonably incurred, even if no damage be found. This latter part of the clause is inserted because the clause, in referring to stranding, only provides for payment of damage caused by stranding, and if no damage occurs the Underwriter would not be liable for drydocking expenses, but for the special agreement to pay such expenses. In some ship policies, however, the franchise clause follows in some respects the old cargo F.P.A. clause, inasmuch as the breaking of the warranty lets in all damage arising from perils insured against even if the damage

does not arise from the accident which breaks the warranty. In such a clause a stranding, &c., will bring in all heavy weather damage, although both stranding and heavy weather damage is below the 3 per cent., while the Institute Clause makes Underwriters liable for stranding, &c., damage although not 3 per cent., but will exclude heavy weather damage if the total claim for both stranding and heavy weather damage is below 3 per cent.

DESCRIPTION OF SUBJECT MATTER.

The method of describing the subject matter insured in a policy on ship differs, but a fairly general description is :—

Hull and materials valued at ... £
Machinery and boilers and bunker coals and stores valued at ..... £

£

In order to lower the franchise for the benefit of the assured, it is customary to insert two valuations in a policy on a steamer, one being the value of the hull and the other being the value of the machinery. In vessels which have some of their holds insulated for the purpose of carrying meat, &c., there is sometimes a third valuation, that of the insulation and refrigerating machinery. In passenger vessels there is occasionally another valuation, viz., that of cabin fittings. Clause 12 provides that donkey boilers, winches, &c., shall be deemed to be part of the hull and not part of the machinery. Clause No. 11 deals with these separate valuations as follows :—

> Average payable on each valuation separately or on the whole without deduction of thirds, new for old, whether the average be particular or general.

A similar clause appears in nearly all hull policies where separate valuations are inserted. If the damage on the hull alone reaches the franchise on the hull valuation, the Underwriter pays the damage to the

hull. A similar remark applies to the other valuations. If the damage on one valuation is under the franchise on that valuation, and the damage on the other is above the franchise and both damages together reach the franchise on the whole valuation, then the whole damage is recoverable, although one valuation may be under the franchise. For example : Hull £10,000, machinery £8000, total £18,000; hull £200 not recoverable (under 3 per cent.), machinery £300 recoverable (over 3 per cent.), total £500 (under 3 per cent. on whole valuation); hull £200, machinery £400, total £600 (over 3 per cent.) both recoverable. Even if the words "or on the whole" were not inserted in the clause, the claim of £600 would be recoverable. The reason for this is that the separate valuations are inserted for the benefit of the assured, and, therefore, if a claim would be recoverable if there were only one valuation instead of two or three, it cannot be excluded by reason of the clause to pay average on each valuation. It is an important principle to bear in mind that a clause which has been inserted for the benefit of an assured is intended to give him a better insurance than he would have if the clause were not inserted, and consequently you cannot place him in a worse position than if the clause had not been inserted. Mr. McArthur, a great authority on Marine Insurance Law and Practice, says :—

> As Clauses of this kind are inserted for the benefit of the assured, they may not be construed to his disadvantage so as to deprive him of any right he would have possessed without them.

I draw attention to this point because I once had a claim before me where there were three valuations, say, for example :— Hull valued £50,000, machinery valued £35,000, insulation valued £5000, total £90,000.

The insulation was damaged and cost £6000 to repair. Some of the Underwriters

considered that as the insulation was valued at £5000 this sum was the extent of their liability. This is not so. If, instead of three valuations there had only been one, that is "steamer valued at £90,000," it would not have been open to them to raise such a point. The damage being £6000 and over 3 per cent. they would have paid the claim without hesitation.

APPLICATION OF PRINCIPLE.

Applying the principle I have just quoted, if the Underwriters would have paid had there been only one valuation, they must also be liable although there were three valuations, the three valuations being inserted in the policy for the benefit of the assured and not for the benefit of the Underwriter. This clause also provides that the average is to be paid without deduction of thirds, new for old. In the days of wooden ships, when a vessel sustained damage, it used to be the rule to deduct from the cost of repairs a certain percentage supposed to represent the improvement to the vessel by reason of the repairs, the law being that a policy of insurance is a contract of indemnity and that an assured must not be better off by reason of his vessel having sustained damage and being repaired at Underwriters' expense. This deduction did not apply to a new vessel on her maiden voyage. This so-called improvement was fixed at one-third, and while it may have been equitable in wooden vessels, it was not so as regards iron ships, and modifications were subsequently made and sometimes sixths instead of thirds were deducted, or the deductions were abolished altogether according to circumstances. Now this rule is practically non-existent as regards steamers so far as concerns average, by the insertion in hull policies of the clause quoted above. The rule, however, still exists in connection with General Average repairs. The reason, I suppose, being that while Underwriters may, if they choose, give

up any rights to insist on a deduction, there is no reason why owners of cargo who have to pay a share of the General Average sacrifice of ship should do so too. Reference to the York-Antwerp Rules will show what deductions are to be made from General Average repairs. The amount to be deducted depends upon the age of the vessel or on the materials sacrificed. Up to one year no deduction is made in repairs to iron vessels. If over one year then some repairs are subject to a deduction of one-third, some to one-sixth and other repairs are made good without deduction, and so on. The parts of the ship more liable to deterioration have the greater deduction. The Underwriter, having by the clause. waived his right to deduct thirds in' particular average claims, agrees further to pay the thirds or sixths that are deducted from the General Average repairs. For example. Supposing General Average repairs amount to £300, and the Adjuster deducts one-third new for old, i.e., £100. There would be a sum of £200 to be allowed in General Average. This £200 would be charged against the ship, cargo and freight. The Underwriter on ship would pay the share chargeable to the ship, and, in addition, would pay the one-third deducted, viz., £100. It is only natural that the Underwriter should do this because the assured is entitled to call upon him to pay direct the whole of the general average repairs in the same way as he pays the particular average repairs. This principle was laid down in the case of Dickinson v. Jardine (1868), where Underwriters were held liable to pay direct a loss by jettison, although such loss was a General Average sacrifice. The Underwriter could not, therefore, with reason pay Particular Average repairs in full and General Average repairs under deduction. If he pays the General Average repairs direct then he receives credit for the amount collected from cargo and freight as their share of the General Average sacrifice, and such share would be diminished by the deduction of thirds, &c.

THE VOYAGE CLAUSE.

Closely connected with the Franchise Clause is the voyage clause (No. 16). The Franchise Clause, i.e., the 3 per cent. clause, is applicable to each voyage, i.e., the damage, in order to be recoverable, must reach 3 per cent. on each voyage, and not 3 per cent. during the whole period of the policy. What is a voyage? Voyage, as we should define it, probably would be the setting out, say, from this country to another country, or in the case of a coastal voyage, the sailing, say, from the Tyne to Liverpool; sometimes we speak of an out or home voyage, i.e., a voyage out from this country and back to this country. In order to avoid any dispute as to what is or what is not a voyage the following clause has been inserted in the Institute Time Clauses :—

> The warranty and conditions as to average under 3 per cent. to be applicable to each voyage as if separately insured, and a voyage shall be deemed to commence at one of the following periods to be selected by the Assured when making up the claim, viz., at any time at which the vessel (1) begins to load cargo, or (2) sails in ballast to a loading port. Such voyage shall be deemed to continue during the ensuing period until either she has made one outward and one homeward passage (including an intermediate ballast passage if made) or has carried and discharged two cargoes whichever may first happen, and, further, in either case, until she begins to load a subsequent cargo or sails in ballast for a loading port. When the vessel sails in ballast to effect damage repair such sailing shall not be deemed to be a sailing for a loading port although she loads at the repairing port. In calculating the 3 per cent. above referred to, particular average occurring outside the period covered by this Policy may be added to particular average occurring within such period provided it occur upon the same voyage (as above

defined), but only that portion of the claim arising within such period shall be recoverable hereon. The commencement of a voyage shall not be so fixed as to overlap another voyage on which a claim is made on this or the preceding Policy.

This clause is a very liberal definition of a voyage, and under it a voyage such as the following would be deemed to be a voyage within the meaning of this clause. A vessel leaves Antwerp in ballast for London, loads a cargo there for South Africa, leaves South Africa in ballast for Australia, where she loads for the West Coast of South America, and the voyage continues from the time she leaves Antwerp until she has discharged her cargo at the ports on the West Coast of South America and until she loads a fresh cargo or sails in ballast to a loading port. This voyage, it is obvious, would take several months, and may be called a very long voyage. On the other hand, the same rule would apply to a short coasting voyage, say, a vessel left Middlesbrough in ballast for the Tyne to load for London, thence proceeds to Southampton and loads for Liverpool; the voyage would end when she commenced to load another cargo at Liverpool or left Liverpool in ballast to another port. This voyage would take less weeks than the other voyage would months. It frequently happens that at the date of the expiry of a Time Policy the vessel is on a voyage, and may have already sustained some damage which does not reach the franchise. She may perhaps sustain further damage during the remainder of the voyage, which damage would not, of course, be recoverable under the expired policy but would attach to the succeeding policy. If the damage on the whole voyage exceeds the franchise then by this clause both sets of Underwriters agree to pay the proportion of damage occurring during the currency of the policy issued by them, although it does not reach 3 per cent. on the part of the voyage covered thereunder. Supposing a vessel is insured from Jan. 1, 1920, to

Dec. 31, 1920, and the next policy runs from Jan. 1, 1921, to Dec. 31, 1921. The vessel is valued at £20,000. She starts on a voyage from the United Kingdom to India and back on Dec. 1, 1920, and arrives back on March 31, 1921. If the damage sustained between Nov. 1, 1920, and Dec. 31, 1920, and between Jan. 1, 1921, and March 31, 1921, exceeds 3 per cent., then the whole damage is recoverable, each set of policies paying the damage which occurred during the period covered thereby.

Before leaving the subject of the 3 per cent. franchise, I would point out that it is very important to bear in mind that the clause refers to particular average only, and in no way concerns general average. The averages are quite distinct, and general average damage cannot be added to particular average to make up the 3 per cent. franchise. (Price v. A.1 Ships Small Damage Association, 1889.) General average is recoverable irrespective of franchise, and although a general average sacrifice gives rise to a contribution by the other parties interested, yet the shipowner, as I have already mentioned, if part of his vessel has been sacrificed, or the cargo owner if his interest has been sacrificed, has the right to claim such sacrifice direct from his Underwriter, the Underwriter receiving credit in due course for the contribution due from other parties. For instance, an anchor is let go to bring up a vessel that is drifting ashore and the cable parts and the anchor and cable are lost; Such a loss is a general average loss and is recoverable from the Underwriter even if under 3 per cent. If in addition the vessel sustained heavy weather damage which in itself was under 3 per cent., but with the loss of cable and anchor would increase the claim to over 3 per cent., the heavy weather damage would not be recoverable. In dealing with this franchise clause there is another important fact to be borne in mind, viz., that the expenses which may be taken into account in ascertaining whether the claim reaches the

necessary franchise are expenses necessarily incurred to repair the damage.

It goes without saying that the actual repairs will be one of the items, other items would be the costs of proceeding into and coming out of dry dock, pilotage charges, if incurred, and so on. Surveyors' fees, Average Adjusters' fees, &c., would not be included. The same remarks would apply to a cargo claim. If the actual damage, exclusive of survey fees, did not reach the franchise, then the damage would not be recoverable, and further, if the claim is not recoverable, neither will these extra charges be recoverable. This does not, of course, apply to the fees of a Surveyor employed by the Underwriters, as they, having employed him, would have to pay his charges.

SURVEY AND TENDER CLAUSE.

Survey and Tender Clause No. 20 reads as follows :—

> In the event of accident whereby loss or damage may result in a claim under this policy, notice shall be given in writing to the Underwriters, where practicable, and, if abroad, to nearest Lloyd's Agent, also, prior to survey, so that they may appoint their own Surveyor if they do desire; and whenever the extent of the damage is ascertainable, the Underwriters may take or may require the assured to take tenders for the repair of such damage. In cases where a tender is accepted by or with the approval of Underwriters, the Underwriters will make an allowance at the rate of £30 per cent. per annum on the insured value for the time actually lost in waiting for tenders. In the event of the assured failing to comply with the conditions of the clause, £15 per cent. shall be deducted from the amount of the ascertained claim.

This clause provides that in the event of damage, advice is to be given to the Underwriters so that they may appoint a

Surveyor. When notice is given to the Underwriter he usually instructs the brokers to advise the Salvage Association, who in their turn appoint one of their Surveyors to survey on Underwriters' behalf. This Surveyor, in conjunction with the Surveyor appointed by the owner, surveys and agrees the damage with the owners' Surveyor and agrees also as to the method of repair. The Underwriters' Surveyor reports fully to the Salvage Association. If the damage is extensive the Underwriters have the right to call for tenders for repairs. The method usually adopted is for both Surveyors to draw up a specification of the necessary repairs and submit same to various ship-repairers asking for their prices for effecting repairs according to specification, and in what time they will undertake to carry out the repairs. This will, of course, cause some delay in commencing the repairs, as the repairers will require some time to make out their calculations to see for what sum they can undertake the work. A specified time for sending in tenders is mentioned in the specification, and when the tenders are received they are examined and it is then agreed between owners and Underwriters, through the Salvage Association, which tender shall be accepted.

Tenders are, as a rule, the best mode of getting repairs effected at the lowest cost. Another method of effecting a large repair is on what is known as a "percentage" basis, i.e., the repairers undertake to charge only the actual amount expended by them in the repairs, plus a percentage for establishment charges, such as office work, rent of dock, &c., and a percentage on all charges by way of profit.

POSITION OF UNDERWRITERS.

In the event of the owner agreeing to repair by way of tender, the Underwriters agree to pay him at the rate of £30 per cent. per annum on the insured value for the time actually lost in waiting for tenders. If,

however, he fails to give notice of damage to Underwriters or refuses to call for tenders, then the Underwriters are entitled to deduct £15 per cent. from the amount of the ascertained claim. The General Average Clause No. 9 reads as follows :—

> General Average and salvage to be adjusted according to the law and practice obtaining at the place where the adventure ends, as if the contract of affreightment contained no special terms upon the subject; or if the contract of affreightment so provides, according to York-Antwerp Rules, or in the case of wood cargoes, York-Antwerp Rules omitting the first word of Rule I. (" No "), but, in all other matters not specifically referred to in York-Antwerp Rules I. to XVII. inclusive, the adjustment shall be in accordance with the law and practice obtaining at the place where the adventure ends, and as if the contract of affreightment contained no special terms upon the subject.

This clause states the basis on which the Underwriters agree to pay General Average. While it may be open to a shipowner to insert in the contract of affreightment a general average clause inconsistent with York-Antwerp Rules, or with the law at port of destination, he can only recover under the policy General Average in accordance with the clause inserted in the policy. He can recover General Average as per law and practice at port of destination, or as per York-Antwerp Rules if in accordance with the contract of affreightment, but in the latter event he can recover, in addition, any items allowable by the law and practice at port of destination if such items are not already specified in York-Antwerp Rules.

For example, according to American law, when a Master decides to seek a port of refuge, there is allowed in General Average the cost of bearing away to the port of refuge, i.e., coals, engine stores, &c., consumed in the operation. The Underwriter, by this clause, agrees to pay his share of such allowance, because there is no reference

in York-Antwerp Rules to this particular matter. On the other hand according to the law of some foreign countries the ship only contributes on one-half of her value. York-Antwerp Rule No. 17 provides for contribution on her actual value, therefore according to the clause, if the General Average is according to the York-Antwerp Rules, the Underwriter will not pay in this respect according to foreign law because the question of value is specifically dealt with in Clause No. 17 of York-Antwerp Rules. A short explanation is required with regard to Rule No. 1. This rule reads :—

> No jettison of deck cargo shall be made good in General Average.

JETTISON OF DECK LOAD.

According to English Law jettison of deckload is allowable in General Average in those trades where it is customary to carry deck cargoes. For instance, ships engaged in the Timber Trade nearly always carry some deck cargo. If part of this deckload is jettisoned for the safety of the vessel and her remaining cargo, the loss is admissible in General Average. Underwriters agree, therefore, in the case of wood cargoes that jettison of deckload shall be allowed in General Average, and they do this by inserting in the General Average clause the words :—

> In the case of wood cargoes York-Antwerp Rules omitting the first word of Rule No. 1 (No).

I would here refer to Clause No. 14, which states :—

> No claim shall in any case be allowed in respect of scraping or painting the vessel's bottom.

Vessels have to be scraped and painted periodically owing to the vessel's bottom plating becoming foul, and to the deterioration of the paint. Scraping and painting become, therefore, an ordinary charge, and when a vessel strands and damages her paint, if Underwriters paid for repainting,

the owners might be relieved of this ordinary charge. The clause often operates hardly on owners, for it might sometimes happens that a vessel strands shortly after having been painted and the clause throws upon the owner the cost of repainting her although such repainting has been caused solely by an accident. In some General Average statements, chiefly foreign General Average statements, there is sometimes allowed part of the cost of repainting after stranding, on the ground that in pulling the vessel off the ground the paint has been damaged. Even if allowed in general average the painting would not be recoverable in view of this clause.

LATENT DEFECTS.

I now come to Clause No. 8, which is known as the "Latent Defect" clause and also as the "Inchmaree" clause. It is called the "Inchmaree" clause as its origin arose out of a decision in favour of Underwriters in regard to a claim on a vessel called the *Inchmaree* (Hamilton v. Fraser). The claim arose out of the bursting of an air chamber of a donkey pump owing to a valve being closed. The closing of the valve was either accidental or due to the negligence of an engineer. The Court held that the damage was not due to a peril covered by the policy. This clause reads as follows:

> This insurance also specially to cover (subject to the free of average warranty) loss of, or damage to hull or machinery directly caused by accidents in loading, discharging or handling cargo, or caused through the negligence of Master, Mariners, Engineers or Pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the ship or any of them, or by the Manager, Masters, Mates, Engineers, Pilots or crew not to be considered as part owners within the meaning of this clause should they hold shares in the steamer.

A latent defect is a flaw in the material due to faulty manufacture. This flaw is not observable from the outside, but when the article is subjected to the ordinary stress and strains the flaw develops and eventually becomes patent and renders the article useless for its intended purpose. The "latent defect" clause therefore adds to the risks covered by the policy; it makes the Underwriter liable for the effects of latent defects. If, owing to a latent defect, a piston rod broke and smashed the cylinder, the Underwriter would have to pay. The damage is not due to a sea peril, but to a latent defect. The Underwriter also has to pay for damage to the ship caused by the negligence of the crew. If owing to negligence the Engineer fails to see that there is a proper supply of water in the boiler and the furnace crowns in consequence get unduly heated and buckle, that is a loss due to negligence of the Engineer and not to a sea peril. The Underwriter, however, has to pay under this clause. It must not be assumed that if this clause were not in the policy Underwriters would be free of all damage to the ship caused by the negligence of the Master, Mariners, &c. The clause, as I have said, adds to the risks covered by the policy, and its absence does not remove from the policy any of the risks mentioned in the body of the policy, viz., the ordinary sea perils. If, owing to the negligence of the Master, the vessel strands or comes into collision, the Underwriter would have to pay the damages caused thereby, as the *causa proxima* of the loss would be stranding, collision, &c.—risks covered under the heading of perils of the sea. The clause also provides that if by the exercise of proper supervision the defect would have been previously detected, any loss would amount to a want of due diligence on the part of the Owner, and Underwriters would not be liable.

The clause further provides for payment of damages to the vessel caused in loading, discharging or handling the cargo. Such damages are obviously not necessarily damages due to sea perils, but under the

clause Underwriters agree to pay all such damages. It must be borne in mind that claims under this clause are subject to the 3 per cent. Franchise Clause. The damage under this clause would be particular average, and if it is under 3 per cent. it would not be recoverable. If, however, other damage has occurred due to another peril covered by the policy, and both damages together exceed 3 per cent., the whole will be recoverable.

OTHER CLAUSES.

There are other sets of clauses issued by the London Institute in connection with insurances on hulls to which I would briefly refer. (1) Excess 3 per cent. Particular Average.—This clause takes the place of the Franchise Clause which I quoted earlier in my lecture. There is only one valuation and claims for particular average are paid in excess of 3 per cent., the owner being his own Underwriter for 3 per cent. of any particular average damage sustained by a peril covered under the policy. (2) F.P.A. Absolutely.—This policy does not pay for particular average damage, but the owner can recover certain damages to hull and machinery if same are allowed in general average. (3) F.O.D. Absolutely.—The Underwriter under these clauses does not pay any damage caused to the steamer, either of a particular average or of a general average character. In so far as they can apply those of the ordinary Institute Time clauses are included. There are still further sets of clauses issued by the Institute in connection with hull policies, but I have dealt with those most commonly in use, and time will not permit me to deal with the remainder.

FIFTH LECTURE.

Delivered February 15, 1921.

ABANDONMENT.

TOTAL AND CONSTRUCTIVE LOSSES.

Total loss, as the words imply, means that the subject matter insured is lost, not necessarily absolutely so lost that not a fragment remains, but that it has lost its identity as the object insured. For instance, a vessel is stranded; she breaks up and what is left is merely the keel and ribs of the vessel and perhaps a few plates clinging to them. In such a condition the remains of the vessel can no longer be called a ship—they are the remains of the ship and are designated as a wreck. The same remark applies to cargo. For example, Roux v. Salvador, where hides were so badly damaged by sea water that the Master of the ship, which had put into an intermediate port, decided to discharge them and sell them. The Court held that if they had been carried on to destination they could not have been delivered as hides but as a putrefied mass. Underwriters had to pay a total loss.

C.T.L.; this differs from a "total loss" in this respect; the vessel by the accident has not been so utterly destroyed that she cannot be called a "ship." She is very badly damaged, but the question is whether she can be restored to a similar condition as that in which she was before the accident, at a cost within what would be considered to be her value after repair. If she cannot, then there is a constructive total loss. You construct or build up on paper, or in other words you

ascertain by certain factors whether it is worth while repairing the ship. It goes without saying that if one had a bicycle which was damaged and found the cost of repairing it would exceed its value when repaired, one would not be so foolish as to have it repaired. One would rather use the money in buying a new cycle. So also a prudent shipowner would not spend more money to repair a damaged ship if, after repairing, he estimated that the ship would be of less value than the cost of repairs.

DEFINITION OF C.T.L.

Sect. 60, Sub-Sect. 2, para. 2, of the Marine Insurance Act gives the definition of a C.T.L. as follows:

> In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired.

As Chief Justice Tindal in Benson v. Chapman, 1843, remarked: "If the damage to the ship is so great from the perils insured against that the Owner cannot put her in a state of repair necessary for pursuing the voyage insured, except at an expense greater than the value of the ship, he is not bound to incur that expense, but is at liberty to abandon and treat the loss as a total loss." Now what are the factors necessary to take into account? (1) The estimated cost of effecting the repairs. This would include General Average repairs in full, not merely ship's proportion of such repairs. (2) Ship's share of any general average expenditure or salvage charges. (3) Any other expenses necessarily incurred to effect the repairs. As, for example, supposing for the purpose of effecting repairs at a cheap port the vessel is towed to that port; the expense of towage would have to be included. (4) The estimated value of the vessel after incurring expenses under Nos. 1, 2 and 3. If the total of items 1, 2 and 3 exceed No. 4, then the vessel is a constructive total loss.

The Institute Time Clauses contain what is known as the Valuation Clause, which reads :—

> In ascertaining whether the vessel is a C.T.L., the insured value shall be taken as the repaired value and nothing in respect of the damaged or break up value of the vessel or wreck shall be taken into account.

The question as to the probable value of a vessel after repair must necessarily be one of much conjecture, and would give rise to considerable discussion. The Valuation Clause I have quoted fixes the value and removes the ground for speculation or discussion and provides that the value to be taken is the figure which appears in the policy as the valuation of the subject matter insured. You will notice that the clause also provides that the value of the vessel in its damaged condition shall not be taken into account.

A DEBATABLE POINT.

It was formerly a debatable point as to whether the value of the wreck should not also be a factor to be taken into account when considering whether a vessel was or was not a C.T.L. If the matter was considered solely from the point of view as to what a prudent uninsured owner would do, there is little doubt but that it would be taken into account. The question has been before the Courts for consideration, and it has been decided in some cases that the value of the wreck should be taken into account. The decisions were given in the Lower Courts, but the case of Macbeth v. The Maritime Insurance Company was taken to the House of Lords and the decision in that case was that the value of the wreck should be taken into account. This decision was given in 1908, but in 1906 the Marine Insurance Act was passed, and Sect. 60, sub-Sect. 2, para. 2 of that Act provides that :—

> In estimating the cost of repairs no deduction is to be made in respect of G.A. contributions to those repairs payable by other interests but account is to be taken

of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired.

There is no mention of taking the value of the wreck into account, and the Act, therefore, settles all disputes on this point. This decision of the House of Lords in the case of Macbeth v. Maritime Insurance Company confirmed the view of those who considered that the value of the wreck should be taken into account. The House of Lords had, however, to deal with the matter as at the time of the issue of the writ, viz., October, 1905, a year before the passing of the Marine Insurance Act. If, therefore, the law prior to the Act of 1906 was to the effect that the value of the wreck was to be taken into account, then the law on the point has been altered by the passing of the Act.

THE OWNER'S OBLIGATION.

Now it must not be assumed that because the cost of repairing a vessel will exceed her value when repaired, the owner is bound to accept a settlement as for a constructive total loss. The value in the policy may be below the actual value of the vessel, as was frequently the case during the war when ships were scarce and freights were high, and the value of vessels rose in consequence. In such a case an Owner might not be able to replace his vessel for a sum equal to the valuation in the policy, and, that being so, he would prefer to have his vessel repaired. In such a case the Underwriters would be liable for general and particular average for the full amount of the policy. The Owner would collect the same sum as if he had claimed a C.T.L. and would keep his vessel, while the Underwriters would pay a sum equal to a total loss and not have the vessel to sell as salvage to diminish their loss.

The Marine Insurance Act, Sect. 60, para. 3, provides that there is a C.T.L. in

the case of damage to goods where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival. If, for instance, a vessel puts into a port of refuge and is so badly damaged that she cannot be repaired and the voyage is abandoned, and the expenses of forwarding the cargo to destination would exceed the value on arrival at destination, then there is a constructive total loss.

There is a constructive total loss on freight if, owing to an accident to the ship, the voyage is abandoned and the cargo cannot be forwarded except at an expense exceeding the original freight.

ABANDONMENT.

In order to entitle an assured to claim as for a constructive total loss he must have tendered abandonment to the Underwriter. A notice of abandonment is a notification by the assured to the Underwriter that he elects to treat his claim as one for total loss even though the subject-matter of the insurance is not, in fact, totally lost and may be recovered. This is usually done by the broker on behalf of his client. Notice may be given verbally, but it is customary to give same in writing. There is no specific form, but the broker generally gives notice in terms similar to the following :—

> We regret to advise you that information has been received that the above vessel ..... (here accident is mentioned) ..... and is damaged to such an extent that the Owners fear the vessel may become a total loss. In these circumstances we are, at their request, notifying you that they abandon to you their title and interest in the said vessel, and that they will in due course claim a total loss of the amount insured under your policy for .....

We presume in the event of abandonment not being accepted you will agree to place the Assured in the same position as if a writ had been issued.

If the Underwriter declines to accept abandonment, he does so in terms similar to the following:—

In reply to your letter of ....., in which you state that the above vessel ..... (here accident is mentioned) ..... and that you are instructed by the Owners to abandon their interest in her, we beg to inform you that we decline to accept the abandonment, but will give our best attention to any claim which may arise. Meanwhile we agree in this instance to place the Owners in the same position as if a writ had been served upon us this day.

The notice of abandonment contains a request to place the Assured in the same position as if a writ had been issued. This is to avoid the incurring of the expense of issuing writs against each individual Underwriter. The issue of the writ bears a very important part in connection with a claim for a constructive total loss, as I shall show later. If the Underwriters decide to accept the abandonment then they pay a total loss and the Shipowner's interest in the vessel passes to them. The acceptance of abandonment is equivalent to the sale of the vessel to the Underwriters, and they become thereby entitled to all the benefits and subject to the liabilities of the Owner.

UNDERWRITERS AND FREIGHT.

Supposing a vessel went ashore and it appeared probable that she could not be salved, and the Owner tendered abandonment which was accepted by the Underwriters. If the Underwriters took steps to carry on the cargo they would be entitled to any freight that might be earned under the original Bill of Lading, less, of course, the expenses incurred by them to earn such freight. Such an advantage might

only accrue if it happened that the vessel met with the accident comparatively near her destination. By abandoning his interest in the ship the Owner gives up all right to earn the freight. In the case of Stewart v. Greenock, Marine Insurance Co. (1848) the Owner abandoned the ship to the Underwriters, who thereupon took steps to carry on the cargo to destination and collect the freight. The Shipowner claimed a total loss from his freight Underwriters, but the Court held that the loss of freight to the Shipowner was not due to a peril insured against. It was due to the Shipowner's action in tendering abandonment to the Underwriters and Underwriters accepting same and taking steps to earn the freight. The Shipowner had transferred to the Underwriters his right to earn the freight and his loss of freight was due to this cause. The freight was not lost, for it was earned by his ship Underwriters. The Shipowner's position in such a case was considered to be inequitable, and in the Institute Time Clauses it is provided that—

> In the event of total or constructive total loss no claim shall be made by Underwriters for freight whether notice of abandonment has been given or not.

We will take an example of a C.T.L.

A vessel, say, strands off the coast of France. Salvors are employed to get her off. They proceed to discharge the cargo and perhaps throw part overboard; the vessel is leaking badly, pumps are employed and eventually with the assistance of tugs the vessel is towed off in a badly damaged condition and taken into the nearest port, where there are no facilities for permanent repairs. Temporary repairs are effected, the cargo is forwarded to destination and the vessel is taken in tow to another port for repairs. When she arrives there she is put into dry dock. Surveyors make an examination and a specification of repairs is drawn up. This specification is sent out to the various ship repairers for the purpose of obtaining tenders for repairs.

We will assume that the policy contains the " valuation " clause, and the value of the vessel in the policy is £15,000. Tenders for repairs are received and they vary, say, from £10,000 to £14,000, or, say, a mean price of £12,000.

We take the repairs at	£12,000
Towage	500
Proportion of Salvage and G.A. ...	3,000
Allow for extras, &c.	500
	£16,000

The insured value being £15,000 the vessel is a C.T.L.

Supposing, however, the expenses instead of being £16,000 are £14,500, then, as the value of the vessel is £15,000 she is not a C.T.L.

You may naturally say, if the Underwriters have to pay £14,500, would it not be to their advantage to pay a total loss and have the vessel to sell for their own benefit? Undoubtedly yes, but the Owner has not only his rights under his policy on hull to consider, but his rights under his T.L.O. insurances on freight, disbursements, &c. If he cannot prove a C.T.L. he cannot recover under these policies, so it would be to his advantage to make his hull Underwriters pay £14,500 and to retain his rights to the ship. If one of the Underwriters had accepted abandonment in such a case as the above, the Owner could call on him to pay a total loss, but he would have to account to the Underwriter for a share of the value of the vessel in its damaged condition, less, of course, the expenses of salvage, &c.

ARRANGED TOTAL LOSS.

Policies, generally reinsurance policies, are sometimes issued to cover against T.L.O., C.T.L.O. or arranged total loss. In Street v. The Royal Exchange Assurance Corporation (July, 1913) the Courts had before them

a case where a claim was made under a reinsurance policy containing the following clause :—

> Being a reinsurance and to pay as per original policy or policies, but the insurance is against the risk of the total or constructive total loss of the steamer only, but to follow hull Underwriters in event of a compromised or arranged loss being settled.

The original Underwriters in this case did not admit a constructive total loss as they were of opinion that the cost of repairing the vessel would not exceed her value when repaired. The Owners, on the other hand, contended that the vessel was a constructive total loss, and an action was brought against the Underwriters, but was settled without going into Court, by the Underwriters paying a sum less than the insured value and allowing the Owners to take the proceeds of the sale of the boat in her damaged condition.

Mr. Justice Bray, in his judgment, stated that there having been a claim for a constructive total loss and that claim having been compromised, there was, in his opinion, within the meaning of the clause in question, a "compromised or arranged loss." He added that he came to that conclusion with some hesitation, but the difficulty entirely arose from the fact that the parties had not put their agreement into clear language. An arranged Loss is, therefore, a settlement effected in a case where there is a dispute between the Owners and Underwriters as to whether or not the cost of repairs is such as to entitle the Owners to claim for a total loss; it is an amicable settlement made to avoid the expenses of litigation.

I have referred to the importance that the issue of a writ bears in connection with claims for constructive total loss. When the case comes before the Courts the circumstances, as they existed at the date of the issue of the writ, are those considered

by the Court. The Owner has, in effect, to prove that on the day he issued the writ against the Underwriters for payment of a C.T.L. the costs of salving and repairing the vessel would exceed her value when repaired. He may have already expended money endeavouring to salve the vessel. Such expenses would not be taken into account because, as mentioned, it is the expenses which will have to be incurred after the date of the issue of the writ.

THE "BLAIRMORE" CASE.

There is a very good example of this rule in the case of the *Blairmore*. The vessel was stranded in the Bay of San Francisco. The Owner tendered abandonment to his Underwriters, which the Underwriters refused to accept; the Owner, however, did not issue a writ. The Salvage Association, on the instructions of Underwriters, made arrangements for salving the vessel, and successfully did so, and the vessel was taken into San Francisco. The salvage expenses amounted to £7600. The vessel was placed in dry dock and was found to be badly damaged. The Owner issued a writ for payment of a C.T.L., and included in his estimate of expenses necessary to restore the vessel the sum of £7600. The Court decided that the Shipowner was not entitled to include this sum in his estimate. The Court had to consider what, on the date of the issue of the writ, would be the expense to repair the vessel. The sum of £7600 could not be called an expense that on the date of issue of writ would have to be incurred, because it had, in fact, already been incurred. The Owner in the case of the *Blairmore* further claimed that although the Underwriters had declined to accept abandonment in writing, yet their act of employing salvors to salve the ship was tantamount to an acceptance of abandonment. This plea would probably have succeeded but for the fact that the policy contained what is known as the waiver clause, which runs as follows:—

> Under this clause it is agreed between the Assured and his Underwriters that an attempt on the part of the Owners or Underwriters to salve the vessel after the Owner has tendered abandonment does not in any way prejudice the Owner's tender of abandonment or the Underwriter's refusal thereof.

What is the effect of an acceptance of abandonment? The late Mr. MacArthur, an Average Adjuster of great repute, in his well-known work "The Contract of Marine Insurance," says :—

> The effect of a valid abandonment is to transfer the whole interest in what remains of the thing insured with all the benefit or advantage incidental thereto from the Assured to the Underwriters. This transfer includes not only the property insured but all the rights and liabilities attaching to its Ownership, and it is retrospective reverting to the time of the casualty which gave the right to abandon.

If an Underwriter accepts abandonment he thereby admits his liability for a total loss. If he refuses to accept abandonment but subsequently pays a total loss, such payment is an admission that the Owner was entitled to abandon. In Sect. 63, Para. 1 of the Marine Insurance Act the effect of abandonment is stated to be as follows :—

> Where there is a valid abandonment the Insurer is entitled to take over the interest of the Assured in whatever may remain of the subject-matter insured and all proprietary rights incidental thereto.

It does not seem to me that these two definitions quite tally, but I think they may be reconciled. Mr. MacArthur says that a valid abandonment transfers all rights and liabilities attaching to the ownership, and one would presume that an acceptance of abandonment is an acceptance by the Underwriter of all rights and liabilities, but the Section I have quoted from the Marine Insurance Act says that the insurer is entitled,

i.e., he has the option of taking over the interest of the assured; if he does so, then he not only takes over the rights, but also the liabilities that may attach to the damaged ship or wreck.

In Suart v. Merchants Marine Insurance Company (1898) the Underwriters were held liable for damage caused to a vessel which collided with the wreck of the *Alleghany*. In this case the *Alleghany* had been sunk in the Delaware River and the Owners had tendered abandonment to their Underwriters. The Underwriters refused to accept abandonment, but it was agreed between the two parties, the Owners and the Underwriters, that attempts should be made to raise the wreck. If it should transpire that the *Alleghany* was a constructive total loss, the salvage would be for the Underwriters, but if eventually it was proved that she was not a constructive total loss, the salvage would be for Owners' account. Where a vessel sinks in a place where she becomes a danger to navigation, the harbour or river authorities have a duty placed upon them to mark the wreck so as to warn passing steamers of its existence. In this case, as salvors were attempting to raise the wreck, the duty of marking the wreck fell upon them. The wreck of the *Alleghany* was not, however, properly marked, and as a consequence a vessel called the *Siberian* collided with it and sustained damage. The Owners of the wreck of the *Alleghany* were liable for the damage done to the *Siberian*. The *Alleghany* proved to be a constructive total loss, and the Court held that the salvors became the servants of the Underwriters and not the Owners, and the Underwriters therefore were held to be liable for the whole of the damage done to the *Siberian*.

Therefore if an Underwriter pays a total loss and takes upon himself the rights of the Owner and takes possession of the wreck for the purpose of raising her, he becomes responsible for any liabilities that may attach to the wreck. If, on the other hand, he prefers to let the wreck alone and com-

mits no act of ownership, then he does not become responsible for the liabilities that may arise in connection with the wreck. If, therefore, a vessel sinks in a spot where she is likely to be a danger to navigation, Underwriters have to consider very carefully whether or not they will exercise their option to take over the rights and liabilities of the Owners. As I have said before, if an Underwriter accepts abandonment, he makes himself liable to pay a total loss, whether or not subsequent events show that the vessel is a constructive total loss, and if after accepting abandonment he assumes ownership of the property, he will, as I have explained, become answerable for liabilities. If an Underwriter refuses to accept abandonment, then the assured must prove the vessel is a constructive total loss to entitle him to recover from his Underwriter.

Clause 17 reads: "In no case shall Underwriters be liable for unrepaired damage in addition to a subsequent total loss sustained during the term covered by this policy." The insertion of this clause is unnecessary, for it is now settled law that an Underwriter is not liable to pay for unrepaired damage in addition to a total loss. An Owner is not bound to have his ship repaired. A vessel may strand and her bottom plating may be set up; this may not affect her seaworthiness, but in the event of the sale of the vessel a buyer would naturally not give so much for the vessel as if she were in sound condition. Therefore, if damages are not repaired, the Underwriter is liable to pay to the Owner the amount of depreciation suffered by the vessel owing to the unrepaired damage. This depreciation is, of course, a matter of estimate, but in any event it must not exceed the estimated cost of repairs.

"WAR" RISKS.

During the war the need for ships was so great that the Authorities would not allow Owners to lay up their vessels for permanent repairs, and would only permit the use of

dry docks for essential repairs to make vessels seaworthy. Therefore, during the war there were very many vessels at sea with damages unrepaired. If a vessel with unrepaired damages should be lost, the loss to the Owner would be a total loss only, not a total loss plus unrepaired damages. It is immaterial whether the vessel is sound or damaged—he loses the whole and he cannot lose more than the whole. The smaller loss of unrepaired damage becomes merged into the greater loss, viz., the total loss. It does not matter whether or not the total loss is due to a risk covered by the policy, the effect is just the same, viz., the Owner loses his ship.

In Livie v. Jansen (1810) a vessel which had stranded and sustained damage was captured while she was ashore. The Owner claimed from his Underwriters a partial loss in respect of the damage due to stranding. The Owner was uninsured for " war " perils. The Court decided that the Marine Underwriters were not liable as the Owner had not sustained any loss by reason of the stranding. The captors sustained the loss, as instead of a sound ship they only captured a damaged vessel. It is quite immaterial whether the Owners are or are not insured against the peril which caused the loss, the fact that the vessel has been totally lost during the period covered by the policy relieves the Underwriter from liability for payment of unrepaired damage. As I have above remarked, during the war many vessels were sailing with unrepaired damages, and in many cases these ships were requisitioned and the war risk was taken over by the Government. The Charter-party provided that in the event of the vessel being lost by a " war " peril they would pay the Owner the value of his vessel. If, therefore, a vessel with unrepaired damaged was torpedoed, the Government only paid the actual value of the vessel, i.e., the sound value less the unrepaired damage. In the case of Wilson Shipping Co. v. British & Foreign Marine Insurance Company (1920) the vessel having been lost by a " war "

peril, the Owner recovered from the Admiralty her sound value less the unrepaired damage of £1770, and he sought to recover from his Marine Underwriters the amount which had been deducted by the Admiralty, as this unrepaired damage was caused by a sea peril. The House of Lords, however, held that the principle laid down in Livie v. Jansen applied to this case also, and decided that the Marine Underwriters were not liable, in other words if the Marine Underwriters would not have been liable if the Owners had not been insured against " war " loss (as in Livie v. Jansen), neither are they liable because the Owner is insured against " war " risks under conditions which do not entitle him to recover the full value in the event of loss.

LOSS AFTER EXPIRY OF POLICY.

If the total loss does not occur during the period covered by the Policy, the position is different. The assured is entitled, as at the expiration of the Policy, to claim from the Underwriter payment for depreciation caused by a peril insured against and existing at that time. If the vessel is lost after the expiry of the Policy, this would not relieve the Underwriters from liability to pay for the unrepaired damage and the under writers on the succeeding Policy would have to pay the full insured value, although the vessel was in a damaged condition. (Lidgett v. Secretan, 1871, and Woodside v. Globe Marine Insurance Company, 1896.) We have, therefore, two instances where vessels with unrepaired damage are subsequently lost; in the first instance the Owner does not recover in respect of his unrepaired damage, and in the other instance he recovers both his unrepaired damage in respect of which he has not sustained any financial loss, and a total loss in addition. This may appear to be inconsistent with the principle that an assured must not make a profit out of a loss, but this is only because the total loss occurred during the currency of the succeeding Policy. The vessel might, however, run,

say, for ten or twenty years with unrepaired damage and then be totally lost, or the Owner may not sell his ship for some years after the accident, in which event the buyer would still require an allowance for unrepaired damaged. Looked at from this point of view, the decision in Lidgett v. Secretan is quite reasonable.

EXCESS GENERAL AVERAGE CLAUSE.

As I have explained to you, an Underwriter is only liable for salvage and general average expenditure in full, if the vessel is fully insured. When policies are effected to cover a period of, say, 12 months, the valuation in the policy is supposed to represent the value at the commencement of that time. During the period of 12 months you will readily understand that the value of vessels may alter—values may rise or fall. The consequence is that sometimes the value in the policy may be below the actual value for the purpose of contribution to general average, and the owner would not therefore be able to collect the whole general average under his ordinary hull policy. If the vessel should be damaged, the amount paid for particular average would have to be deducted from the policy value in order to ascertain the value on which the Underwriter would be liable.

Contributory value	£12,000	pays ... £120
Insured value	£10,000	
Less P.A.	2,000	
	£8,000	pays ... 80
	Amount unrecovered ...	£40

This £40 would be recoverable from the excess liability Underwriter provided that the owner had taken out a policy for a sum equal to the difference in value, viz., £4000, i.e., £12,000 less £8000. If his excess general average policies were only for £3000 he would recover three-fourths of £40. If his policies were for £5000 he would, of course, recover the full £40, but not more than £40.

SIXTH LECTURE.

Delivered February 25, 1921.

THE COLLISION CLAUSE

AN ANALYSIS OF CLAIMS.

This evening I propose to deal with Claims under the Collision Clause, or, as it is sometimes called, the Running Down Clause. There have been in the past several forms of R.D.C., but the form as it appears in the Institute Time Clauses is the one now generally in use, and my remarks will deal with this form of clause. I would, however, first refer to a shipowner's liability apart from the clause. According to law a shipowner is liable for damages caused by the negligent navigation of his ship. These damages need not necessarily arise from collision, as, for instance, if a steamer passing down a river at an excessive speed which would naturally cause a great disturbance of water, and the wash thus caused did damage to barges, causing them to collide with one another or to break loose, the shipowner would be responsible for the damage done. Shipowners are, by the terms of the Merchant Shipping Act, entitled to limit their liability for damages caused by negligent navigation. The Act, among other matters, provides that if, by reason of improper navigation of a vessel, there should be loss of life or personal injury to any person on board any other ship or vessel or damage to such other ship or vessel or cargo on board thereof, the owner of the wrong-doing vessel is only answerable to the extent of £15 per ton of the vessel's registered tonnage if there should be loss of life or personal injury, or £8 per ton if the damage consists only of damage to

ship and cargo. The limitation of liability is only granted provided it can be shown that the improper navigation is not due to the actual fault or privity of the owner of the wrong-doing vessel.

If, therefore, the damages caused to the other vessel exceed the shipowner's liability as fixed by the Act, he makes an application to the Court for limitation of liability. Applications for limitation of liability are invariably granted, but quite recently a case came before the Courts where the application was refused. A vessel had come in collision and sunk another ship. The collision was due to faulty steering gear which failed to act properly, causing the ship to manœuvre badly and come into collision with the other vessel. This steering gear had caused trouble previously, and its defective condition was known to the owners. The Judge found that the owners did know, not of the special defect, but of such failure of action in the steering gear as shown, which ought to have conveyed to them that it was a dangerous thing to send a ship to sea without making proper investigation to ascertain the cause of the defective action. Under these circumstances, the Court declined to limit the shipowners' liability to £8 per ton, and consequently they have to pay the whole of the damage caused.

LIMIT OF LIABILITY.

As I have mentioned, if there is loss of life, the shipowner's limit of liability is £15 per ton. £7 per ton is used exclusively for life and personal injury claims, and if this is not sufficient to meet such claims, the balance of these claims rank *pari passu* with the ship and cargo claims against the remaining £8 per ton. The R.D.C. provides that in the event of the vessel insured coming into collision "with another ship or vessel and the insured shall in consequence thereof be liable to pay and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision,"

the Underwriters will pay three-fourths of such damages provided the total damage payable by the owner does not exceed the value, i.e., the insured value of the ship. This does not mean that if the damages do exceed the value of the vessel the Underwriters do not pay anything, but that in the event of the damages exceeding the insured value they will only pay on the basis of three-fourths of the insured value. The clause also provides for payment of three-fourths of costs incurred in legal proceedings in connection with the collision provided same are taken with the Underwriters' consent. There are other provisions in the R.D.C. which I will deal with later.

The provision to pay only three-fourths is a very old provision, and it was probably thought that if an owner had to bear one-fourth of the damage himself then he would bring pressure to bear on his servants to exercise extreme care in the navigation of his ship. A similar provision is, as you know, made in connection with the pilferage clause in cargo policies, where Underwriters only pay three-fourths of pilferage claims so as to bring pressure to bear on cargo owners to have their goods properly and securely packed so as to minimise the risk of theft.

Shipowners, however, insure the one-fourth of their liability in a Protection and Indemnity Association. These Associations are Mutual Associations formed by shipowners themselves by which they insure themselves against their liabilities not covered by ordinary Marine Insurance Policies. The R.D.C. refers solely to damage by collision, i.e., collision with another ship or vessel. A collision with a ship or vessel will include collision with any part of its apparel which is in connection with the ship, such as the anchor or the ship's boat towing astern. It would not, however, include fishing nets attached to a trawler. This was so decided in the case of the Bennett Steam Ship Company v. Hull Steamship Protection Society. The

Burma collided with the nets of a trawler off Boulogne. The trawler herself was over a mile away; the nets were, of course, attached to the trawler. The owner of the *Burma* had to pay for the damage done and the question raised was whether he could claim from his Underwriters under the R.D.C. for their share of the sum so paid. The Courts decided in favour of the Underwriters.

Damage done to a sunken ship which could have been raised and repaired would be a collision with a ship or vessel, but damage done to a sunken ship which was unsalvable would not—that would be collision with a wreck.

Dealing with the R.D.C., so far as I have reference to it, I will take the following example of its application. A's vessel (insured value £10,000) comes into collision with B's vessel and does damage to the extent of £2000, which B claims from A, together with demurrage (damages for loss of use of vessel during repairs) amounting to £500, a total of £2500. The damage is due to the negligence of those on board A's vessel, and in consequence thereof A has become liable to pay and has paid £2500, and he therefore receives from his Underwriters £1875, being three-fourths of the £2500, the remaining one-fourth of £625 he claims from his Protection Club. A's boat has also sustained damage, but as the accident is due to negligence of A's servants, he cannot recover anything from B. He looks to his Underwriter to pay him for the damage to his ship, but he has to bear himself the loss of his demurrage.

SINGLE LIABILITY.

If, however, neither A nor B will admit liability for the damage done, but both claim that the other is liable, then the matter can either be dealt with by an agreed Arbitrator or decided in a Court of Law. Assuming that it is finally decided that both

vessels are equally in fault, then the two owners have each to bear one-half of the other's loss. A's damages £1000, demurrage £500; total £1500. B's damages £2000, demurrage £500; total £2500. B's damages of £2500 being in excess of A's damages of £1500 leaves a difference of £1000 in favour of B, and A pays B one-half of £1000—£500. This is the rule of settlement on the basis of single liability which is the established method of dealing with such a case. It has the same effect as far as the relationship between A and B is concerned, as if A had paid B one-half of £2500, viz., £1250, and B had paid A one-half of £1500, viz., £750, the difference of £500 being the sum payable by A to B.

A having paid B the sum of £500 for damages caused to B's ship then proceeds to make his claim under the policy:— He claims as P.A. the damage caused to his own ship, viz., £1000; and from his Underwriter three-fourths of the sum paid to B, viz., £500; and from his Club one-fourth of the sum paid to B, total £1500.

LOSS OF DEMURRAGE.

He has, however, in addition to the damage to his ship, sustained a loss of demurrage of £500. As B was responsible to him for one-half of his loss, he would naturally expect to recover one-half of his demurrage of £500, viz., £250. This is, however, not so, if the claim is recoverable from the Underwriters on the basis of single liability, as A having P.A damage to the extent of £1000, and having paid for damage to B's ship, £500, and sustained a loss of demurrage of £500 of which £250 is supposed to be payable by B, his recoverable loss either from his Underwriters or Club and from B should be £1750. But he only recovers P.A. £1000; D/D to B's vessel £500, total £1500, leaving him out of pocket for one-half of his demurrage, viz., £250.

This effect is brought about by the wording of the R.D.C., under which Underwriters pay three-fourths of the sum paid by the Assured, i.e., the actual sum which he has to hand over to the other Owner, which in the instance quoted is £500.

CROSS LIABILITIES.

This is, of course, inequitable, inasmuch as the Underwriters and Club in only paying A the actual amount paid by him to B are taking credit for the £250 demurrage (which B is supposed to pay to A) to which they are not really entitled. This hardship is remedied by the insertion in the R.D.C. of the Cross Liabilities clause, which runs as follows :—

> .....but when both vessels are to blame ..... claims under this clause shall be settled on the principle of cross liabilities as if the owners of each vessel had been compelled to pay to the owner of the other such vessel such one-half or other proportion of the latter's damage as may have been properly allowed in ascertaining the balance or sum payable by or to the assured in consequence of such collision.

I find the greatest difficulty in placing the position in such a clear light that you can readily follow my figures. The mass of figures involved, I must admit, is enough to confuse anybody, and they require very careful study to enable one clearly to understand the matter. In order to make my case as clear as I can I propose to take as an example a case where two vessels are in collision, the collision is due to mutual fault and the damages are both equal—a very improbable supposition.

A's Damages.

Ship	£2,000
Demurrage	500
	£2,500

B's Damages.

Ship	£2,000
Demurrage	500
	£2,500

No payment passes between A and B, and their only recourse is to their Underwriters for payment of their Particular Averages of £2000 each. A and B therefore receive no recovery in respect of their demurrage, as neither Underwriters nor clubs make any payment under the R.D.C. under the Single Liability Principle.

On Cross Liabilities.

A's Underwriter pays	£2,000
Less one-half recovery from B	1,000
	£1,000
One-half of B's damages—three-fourths paid by Underwriters, one-fourth paid by Club	1,250
Leaving A to bear one-half of his demurrage loss of £500	250
	£2,500

and B recovers £2250 from his Underwriter and Club on the same basis, and bears the loss of one-half of his demurrage, viz., £250 himself.

We will now take the example previously given and show the position of A as regards his claim against his Underwriters :—

A's damages to his ship were		£1,000
Demurrage		500
		£1,500
B's damages to his ship were	£2,000	
Demurrage	500	
		2,500
Difference in favour of B		£1,000
Of which A pays to B one-half		£500

Under the Cross Liabilities Clause A's claim on Underwriter is as follows :—

For P.A.		£1,000
Less credit for one-half recovered from B		500
		£500

and under the R.D.C.

One-half of B's damages of £2500, viz., £1250, three-fourths of which	£937 10 0	
	£1,437 10 0	
The remaining one-fourth payable by Club	312 10 0	
Makes the total recovery of A		£1,750 0 0

A's recoverable loss is :—

Damage to ship		£1,000
One-half of his demurrage of £500		250
Amount paid to B		500
		£1,750

the whole of which he recovers from his Underwriters and his Club, as above.

B's position with regard to his Underwriters and his club on the Single Liability basis is as follows : —

B's loss :—

Ship's damage	£2,000	
Demurrage £500, of which he is entitled to receive one-half	250	
		£2,250
He receives from A £500, of which 20/25ths is for damage to ship	£400	
And 5/25ths for loss of demurrage	100	
		500
B's loss after A has paid him £500		£1,750
He recovers from his Underwriters		£2,000
Less Underwriters' share of recovery from A		400
		£1,600

Here again his loss of demurrage was	£500
Of which he should be entitled to recover one-half from A	250
	£250
But of the 500 paid by A, his Underwriters get £400, and he receives only	£100
Showing that he receives short for demurrage	£150

As B has not paid anything to A his Underwriters have nothing to pay under the R.D.C.

If the matter is dealt with on the principle of Cross Liabilities, B's position will be put right in the same way as A's, and it will be found that B will receive one-half of his demurrage in full and his Underwriters and Club will pay B's liabilities for his damages to A's ship.

UNEQUAL LIABILITY.

It does not always follow when two vessels are in collision and are both to blame, that the blame is equal; sometimes one is more to blame than the other, and if this is so, the Courts apportion the blame, say, one-fourth and three-fourths, or other proportion. In such cases the damages are divided accordingly, instead of half and half.

In quoting the paragraph in the R.D.C. dealing with the principle of Cross Liabilities, I omitted certain words, which were :—

> Unless the liability of the owners of one of both such vessels becomes limited by law.

That is to say, in the event of there being limitation of liability, then the principle of Cross Liabilties cannot be claimed by the assured when collecting under the R.D.C. Where there is limit of liability there may be an equal hardship on the owner by reason of his claim under the R.D.C. being based on the principle of single liability.

I once had a case before me like the following :—

A's vessel damages B's vessel.

A's damages are	£3,000
Demurrage	£1,000
	£4,000
B's damages are	£14,000
Demurrage	£4,000
	£18,000

Difference £14,000—one-half of which (£7000) payable by A to B. A obtains leave to limit his liability to £8 per ton, which we will take as £6000—and pays this sum to B. A claims from his Underwriters and Club £6000; his own policy does not cover him against Particular Average, so that although he has sustained a loss of £4000 and B is supposed to be liable for one-half of his damages, yet he recovers nothing but has to bear the whole of his damages himself. As a prudent owner, he must, of course, limit his liability, but as his Underwriter and Club shoulder his liability for damages done, it is they, and not he, who gain. He, in fact, loses, for if he had not limited his liability he would in theory have paid £9000 and received one-half of his damage of £4000 (£2000), leaving £7000, and on the principle of Cross Liabilities his Underwriter and Club would have had to pay him £9000 instead of £6000.

The reason for excluding "limited liability" claims from the operations of the "Cross Liabilities" principle is, I think, the following :—In the instance I have quoted, you will see that A does not pay one-half of B's claim. B's one-half claim is £9000, and A only pays £6000. It is really immaterial in the instance quoted whether A is only half or wholly to blame—he has to pay the same amount, i.e., his limited liability of £6000. If B was in no way to blame and the blame was entirely due to A's servants, A would still be entitled to limit his liability and only pay £6000. It is therefore impossible to assume in theory that

both sides pay to each other one-half of their respective damages. In dealing with claims on the principle of Cross Liabilities you assume in theory that B's claim is reduced by A's claim, but A limiting his liability for £6000 does not pay as much—B's claim, £9000, reduced by A's claim, £2000, viz., £7000. Therefore you cannot, even in theory, assume that B's claim is reduced by A's, when A only pays £6000.

If you did you get the following incorrect result:—

A's liability to B is £6000
which is less than half his damages, and
B's liability to A is £2000
one-half of A's damages,

leaving a balance £4000

payable by A to B, whereas, in fact, A has to pay £6000.

And moreover, as A, by limiting his liability, does not pay B one-half of his claim, therefore it would not be equitable to assume that A is entitled to receive one-half of his claim.

CARGO CLAIMS.

Further, taking into consideration that in both to blame cases cargo claims may be involved in addition to claims for damage to ship where "liability is limited," one can quite see that the matter is altogether too involved to permit the application of the Cross Liabilities principle in such cases. I would like to point out here that as regards cargo claims, there is no set off as in the case of damages to ship. A's cargo owners claim direct from shipowner B, and B's cargo owners claim direct from shipowner A. Each shipowner is liable to pay direct to the cargo owners the proportionate share of the damage done to the cargo on the other boat, and such payments are not taken into account in settling the balance of claim, as between the two shipowners.

The method of apportioning a claim where the shipowner limits his liability is, of course, simple.

Limited liability of A	£6,000
Apportioned as follows:—	
B's half damages	£9,000
A's half damages	3,000
Difference in favour of Shipowner B	6,000
B's one-half cargo claim	12,000
	£18,000

i.e., total claims of £18,000 have to be reduced to £6000, so that each claimant recovers 6/18ths, i.e., one-third of his claim, viz.:

B recovers one-third of £6000 ...	£2,000
B's cargo recovers one-third of £12,000	4,000
	£6,000

Supposing the damages to A's ship are		£5,000
Demurrage		1,000
		£6,000
And damages to B's ship are	£14,000	
Demurrage	4,000	
		£18,000
Difference		£12,000

one-half of which (£6,000) would rank against the limited liability of A.

You cannot apply the Cross Liabilities principle to such a case. If A attempted to claim from his Underwriters on the principle of Cross Liabilities he would find himself in an *impasse*, for he has not paid B one-half of B's damages reduced by one-half of his own. B's one-half damages was £9000, but owing to A limiting liability and there also being cargo claims, he only recovers £2000. It is, therefore, quite clear that the amount paid to B has not been reduced by A's damages.

In the illustration I have given you will see that B's half damages are £9000, but A only pays B £2000, and it would, therefore, be absurd to imagine that B would pay A one-half of his damages, or £3000. You could only apply the clause if it could be shown that A's liability to B was reduced by B's liability to A, which is not the case.

The clause provides for recovery of damages that the assured may have to pay in consequence of such collision, i.e., it may be that the consequences of such collision are not merely the two vessels coming into contact and doing damage to each other, but there may be further damages consequential on such collision.

In the case of W. France, Fenwick v. Merchants Marine Insurance Company, the Underwriters were held liable to pay for consequential damage arising out of the collision of the *Cornwood* with the *Rouen*. These two vessels were in collision in the Seine, the impact causing considerable suction, which drew another vessel called the *Galatea* on to the *Rouen*. As the *Cornwood* was held liable for the collision with the *Rouen*, the owners also had to pay for the damage done by the collision of the *Galatea* with the *Rouen*, as it was considered that the collision between the *Galatea* and *Rouen* was a consequence of the collision with the *Cornwood* and *Rouen*.

REMOVAL OF OBSTRUCTIONS.

The R.D.C. further provides that an assured cannot recover damages which he has become liable to pay for removal of obstructions, injury to wharves, harbours, &c., in consequence of such collision; or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury. If, as a result of the collision, damage is done to piers, stages and similar structures, the Underwriters will not pay for such damages, although they may be consequential on the collision. Neither are they liable to pay any sums which the

assured may have to pay for loss of life or personal injury, or for loss of cargo on board the vessel itself, which may have been damaged by such collision. The loss of life and damage to wharves, harbours, &c., excluded under the R.D.C. are usually covered by one of the Protection Indemnity Clubs, while the owner generally escapes liability for damage to his own cargo by reason of the terms of the Bill of Lading under which such cargo is carried.

The concluding paragraph of this clause deals with cases where the two colliding vessels belong to the same owners, part owners, or are under the same management.

This clause, so far as collision claims are concerned, was inserted as a consequence of the decision in the case of Simpson v. Thomson, 1877. Two vessels, A and B, belonging to the same owner, came in collision and B was sunk. The collision was due to the fault of those on board A. The claims in respect of cargo on board B exceeded the limited liability of the owner, who limited his liability and paid the amount into Court. The Underwriters, having paid a total loss to the owner for the loss of B, claimed to be entitled to participate in the money paid into Court. The Court decided that the payment of a total loss did not entitle the Underwriters to any rights not possessed by the assured, and as he, as owner of B, could not recover from himself as owner of A, neither could his Underwriters do so.

The same principle is by the clause conceded in the case where one vessel renders salvage services to another, and the owners of both vessels are the same—i.e., where A has rendered salvage services to B. The owner could not, as owner of A, sue himself as owner of B.

This clause, of course, does not apply to cargo. The owners of cargo, as I have previously remarked, have the right to claim direct against the shipowner for damages by collision, and the shipowner could claim sal-

vage services direct from the owners of cargo on board the salved vessel.

The clause, however, removes a hardship in cases of collision, for, as I have shown, it enables the owner to recover part of his demurrage, while as regards salvage, he would naturally sustain certain losses in respect of the salving steamer—loss of hire, crews' wages, &c., during the towage—which he would not be able to recover from the Underwriter of the salved vessel if this clause were not inserted in the policy.

"CAUSA PROXIMA."

I can, of course, only touch on the fringe of *causa proxima*—time will not permit me to deal with it at length. An effect is the result of a cause, and that cause may be the outcome of other causes. Say two motor cars came into collision—result, damage to both cars. Why has the collision occurred? Because one of the cars was being driven at too great a speed. Why was the car being driven at too great a speed? Because the owner was anxious to reach the station in time to catch a certain train. Why did he want to catch this certain train? And so on *ad infinitum*. We here have a number causes ending in one final cause, viz., collision. The initial cause is called *causa remota*. A little consideration will show how far remote a cause may be. The intermediate causes are called *causa causans*, and the final cause is called *causa proxima*. The application of the principle of *causa proxima* in Marine Insurance is important, for it in most cases removes the ground for speculation in considering the cause to which losses may be due.

The case of Pink v. Fleming is an excellent example. A vessel having been in collision, puts into a port of refuge for repairs. To effect these repairs it is necessary to discharge the cargo. While being discharged the cargo becomes damaged by handling. The goods were insured against

damage consequent upon collision with any other ship. A claim was made on Underwriters for the damage. The Court decided in Underwriters' favour—the goods were damaged by handling, not by collision. It is true that if the collision had not occurred the goods would not have had to be discharged, and therefore could not have been damaged by handling, but the collision did not occur without cause. What was the cause of the collision. The collision was due to an error on the part of the steersman, who improperly manœuvred the ship. If you could claim that the damage to the cargo was due to the collision, you could with just as much logic claim that it was due to the act of the steersman or to the cause which made the steersman commit the error. The goods were not bound to be damaged because they were discharged, and consequently such damage could not be said to be the inevitable result of the collision.

The sequence of causes from *causa remota* to *causa proxima* resembles a chain with a number of links, each of which links represent a cause, and each cause must reasonably bear the test of showing that the succeeding cause is the inevitable outcome, or perhaps, I should say, unavoidable outcome of the preceding cause. In such a way a cause, although not the final cause, may in effect be the *causa proxima*. The principle of *causa proxima* must be applied in a reasonable spirit in those cases where too literal application would cause a hardship. Lord Selborne in the case of Inman Steamship Company v. Bischop in 1882 said :

> The general principle of *causa proxima non remota spectatur* is intelligible enough and easy of application in many cases, but there are cases in which a too literal application of it would work injustice and would not be really justified by the principle itself.

Causa proxima has been described as the " dominant " cause.

THE "DOMINANT" CAUSE.

Take the case of the *Ikaria*. This vessel, when in the Channel, was torpedoed about 25 miles from Havre. She did not sink but sustained serious damage and was naturally taken to the nearest place for safety, which was alongside the quay at Havre. The authorities, however, would not allow her to stay there, and she was removed to a berth which proved to be unsafe under the circumstances, and there she stranded and became a total loss. Between the time of her being torpedoed and the time that she became a total loss no peril intervened to alter the effect of the result of the torpedoing, although there is some record of heavy weather while she was moored in the outer harbour, but this was considered to have had no effect on the ultimate result. The quay at Havre might not have existed at all so far as the *Ikaria* was concerned, for she was not permitted to stay there, and therefore the narrative can be shortened by stating that the vessel, having been torpedoed, was placed in the safest place available, which, however, proved to be an unsafe place. It is the same in effect as if, after being torpedoed, the *Ikaria* had been run on to the rocks to prevent her sinking and had broken her back while there.

Looked at from this view, it is quite clear that the total loss must be attributed to the torpedoing. The next case I will refer to is that known as the "rat" case—Hamilton v. Pandorff (1887). Although not a case where Underwriters were directly involved (for it was a case of cargo owners against shipowners, the cargo owners claiming damages to goods from the shipowners and the shipowners claiming that the damage was due to a sea peril, and that they were not liable) it is an instance where the principle of *causa proxima* was applied. We will assume for the purpose of illustration that it is a case brought by an assured against his Underwriters.

The matter concerned a cargo of rice shipped from Akyab to London. On arrival

in London it was found that the rice was damaged by seawater. On investigation it was shown that the damage was caused by seawater passing through a hole made by rats in a leaden discharge pipe. Now damage by rats is not a sea peril and is not covered by a policy, but damage by seawater is a peril of the sea and is covered. One would naturally say that if the cause of the water entering the hold was due to the action of the rats the damage by contact of the sea water with the rice was a consequence of the action of the rats. If you apply to this case the same reasoning as I have applied to the case of the *Ikaria* you would perhaps and quite naturally arrive at that result, as if the *causa remota* is the action of the rats, the intervening causes were the direct and unavoidable result of the action of the rats.

But there is an important difference between the two cases. In considering Hamilton v. Pandorf strictly from an insurance point of view there can be no doubt that the proximate cause of the damage is contact with sea water, and sea water entering the ship from the outside would be a peril of the sea. You will perhaps, however, remark that, as I have just said, the *causa remota*—i.e., the rats—has in effect become the *causa proxima*, and if damage by rats is not a peril covered by the policy, why should the consequential damage arising out of the act of the rats be covered?

In the case of the *Ikaria* I mentioned that the total loss of the vessel was due to stranding, and in the case of the rats that the damage was due to sea water, both of which perils are covered by an ordinary marine policy. The marine policy in the former instance contained an exception clause, which clause excludes certain perils, as follows :—

> Warranted free of capture, seizure, arrest, restraint, or detainment, and the consequences thereof or of any attempt thereat (piracy excepted) and also from all consequences of hostilities or warlike

operations, whether before or after declaration of war.

Now, in the case of the *Ikaria*, although the stranding is a marine peril, yet it was the direct consequence of an act of hostility, and therefore the loss becomes excluded from the terms of the policy. In the "rat" case the Underwriters would have been free from damage done by the rats themselves to the rice, as such damage is not covered under a marine policy.

There is, however, no similar exception clause regarding rats as there is regarding hostilities. If there had been a clause in the policy warranted free from the consequences of the presence of rats on board the steamer, and damage to the rice being the direct consequence of the action of rats, the policy would have been free from the claim. In one case—the *Ikaria*—the loss was not recoverable because it was a consequence of a peril excluded from the policy, viz., warlike operations, and in the other case it would be recoverable because it was due to a peril covered by the policy and there was no clause in the policy which excluded the consequences of the presence of rats on board.

In the case of Cory v. Burr, the application of the rule of *causa proxima* is clearly seen. The Spanish authorities arrested a steamer because her Master was endeavouring to smuggle tobacco into Spain. The act of the Master was an act of barratry and the policy covered barratry, but contained the F.C. & S. Clause, i.e., "warranted free of capture, seizure, &c." The owners had to pay a heavy fine to obtain the release of their vessel and they claimed the amount from their Underwriters on the ground that it was expense occasioned by the barratry of their Master. The Court held that the expense had been occasioned by the seizure of the vessel, and as seizure was one of the excepted perils, the Underwriters were not liable.

Speaking of seizure, the following problem was recently placed before me. A merchant

in perfect good faith bought some cases of goods and dispatched them abroad. Before they reached the seaport the police authorities seized the goods, as it was found that they were stolen goods. The policy covered the goods from warehouse to warehouse, and the F.C. & S. clause was deleted. The owner claims on his Underwriter for a total loss by seizure. Is the Underwriter liable? I think not. The assured points out that the warranty "free from seizure" has been deliberately struck out of the policy and that the effect of this deletion is to make seizure one of the risks covered by the policy. This is not the correct view to take. The deletion of the clause merely reinstates in the policy the risks which it excluded. We have therefore to ascertain whether "seizure" as such is a risk covered by the policy. Now the word "seizure" does not appear in the body of the policy as one of the risks covered. The nearest approach are the words "surprisals, takings at sea," neither of which could apply in this case. The policy mentions "men-o'-war, enemies, pirates, &c.," "arrests, restraints, and detainments of all kings, princes and peoples, &c." If seizure arises out of one of these risks it would be covered.

JUDICIAL PROCESS.

The next question is whether the risks mentioned can cover the action of the police. I think not. The words "arrests, restraint, &c.," do not include loss arising from ordinary judicial process as would be the case here. There is, moreover, a further point involved—it may probably be that this stolen property, although purchased in perfect good faith, can never be said to be the property of the assured. Under some circumstances a person who buys stolen goods in good faith and in the open market, is entitled to retain possession of them, but there are other circumstances where, although the goods may be bought in good faith, yet the buyer is not entitled to retain possession. If, in the present instance, the purchase came under the latter category,

he would have no insurable interest in the goods, and having no insurable interest he could have no claim. His loss in such a case would not be a loss by seizure, but loss by the fact that according to law the sale of the goods to him was invalid.

The next case to which I will refer is that of Montoya v. London Assurance. Hides were shipped in the same hold as tobacco—the hides became badly damaged by sea water, causing them to ferment and decompose, and the noxious odour arising therefrom tainted the tobacco. The Underwriters were held liable for the damage to the tobacco on the ground that the damage to the hides was due to a sea peril and the damage to the tobacco was the direct result thereof.

I now refer to what is probably the most often quoted case in connection with this subject, viz., Ionnides v. Universal Marine Insurance Company. During the American Civil War an insurance was effected on 6500 bags of coffee by a Federal ship from Rio Janeiro to New York, with the F.C. & S. Clause inserted in the policy. The vessel went ashore near Cape Hatteras, the light upon the Cape having been extinguished by the Confederates with hostile design against Federal shipping. The vessel and her cargo were totally lost by the stranding, with the exception of 120 bags of coffee, which were landed and seized by the Confederate troops, and about 1000 bags might have been salved had not the soldiers prevented it. The Court held that the warranty only exonerated the Underwriters from paying for the 1120 bags—holding that the remainder were lost proximately by a sea peril. The vessel stranded—stranding is a sea peril, as in the case of the *Ikaria*. If the stranding was inevitably due to the extinction of the light (the extinguishing of the light being a hostile act), the stranding would have been a consequence of the hostile act. There is little doubt but that the stranding would not have taken place if the light had not been extinguished.

This argument, however, is not sufficiently effective. The link in the chain of causation is not strong enough. The Master by taking his proper reckonings would have known where and at what time he would expect to see the light, and not seeing it at that time and place his suspicions should have been aroused, and if he had taken precautions to ascertain his whereabouts by using his lead, he would have found that he was nearing the land and could have taken steps to alter his course. The stranding was, therefore, brought about by the want of due care on the part of the Officers of the ship. If it could have been shown that every ship on a voyage from Rio Janeiro to New York at that time must inevitably have gone ashore owing solely to the absence of the light, the case would have been decided otherwise.

WAR INSTANCES.

I will not detain you much longer, but you will probably like to hear some remarks on two important classes of cases which have arisen during the war, viz., accidents arising from collisions between vessels sailing without lights, and losses sustained by owners of cargo on board German steamers which took refuge in Neutral ports on the outbreak of war. With regard to the first-mentioned class of case, the Courts have decided that when two merchant ships sailing without lights come into collision owing solely to the absence of lights, the damages arising from such collision are recoverable under the marine policy and not the War Risk Policy. The "man in the street" would naturally say, "If the vessels in accordance with Admiralty instructions sail without lights, in order that their whereabouts may not be disclosed to the enemy submarines and thus minimise the chances of attack, losses solely arising from precautions to avoid the peril must be taken as losses due to the peril." While this appears to be a reasonable argument, it will not bear the *causa proxima* test.

If it could be shown that submarines were in the neighbourhood, and in order to re-

move the ships from imminent perils, orders were given to steam full speed ahead, and in so doing, owing solely to the absence of lights, the collision occurred, the result might be different. In the case where the point was tried, viz., the *Petersham*, no such suggestion was made. The order to sail without lights was general, whether submarines were known to be in the vicinity or not. The damage was due to collision, a risk covered by the marine policy, and was not excluded by the F.C. and S. clause, because the collision was not due to consequence of hostilities but to a precaution taken to prevent a possible hostile attack. During the air raids, all lights were extinguished in the streets. Supposing a motor without lights, proceeding along the road, collides with another car, also not showing lights, and the collision is solely due to the absence of lights on both vehicles—you could not say that the collision was the result of hostile operations. The Zeppelins might not come within miles of the place.

In another case the *Saint Oswald* and *Suffren* were in collision, occasioned solely by the absence of lights, and the Court held that it was a "war" loss, the reason being that the *Suffren*, which was a battleship, and the *Saint Oswald*, which was engaged in the transport of troops, were both employed in warlike operations. The sailing without lights was to enable these warlike operations to be carried out with immunity from attack by submarines, therefore the loss was attributed to the consequence of warlike operations. I now deal with my last illustration, that of the *Kattenturm*, Becker, Gray & Co. v. London Assurance Corporation. The *Kattenturm* was on a voyage from India to Hamburg, and on the outbreak of war was in the Mediterranean. The Master at once made for Messina and decided to stay there. It may be admitted that had he attempted to proceed on his journey the chances were all in favour of the vessel being captured by one of the Allied cruisers when he approached Gibraltar. He very wisely did

not make the attempt, but decided to remain where the Allied cruisers could not reach him. Messrs. Becker, Gray & Co.'s goods were insured by a policy with the F.C. & S. Clause deleted, so that the policy covered such war risks as were included in the body of the policy. A claim was made for total loss on the ground, among others, of capture, the plaintiffs alleging that had the vessel proceeded she would have been captured. This would have been quite probable had the steamer gone on, provided, say, she reached the neighbourhood of Gibraltar, but, on the other hand, she might have been sunk by collision or driven ashore during a storm before she came near to Gibraltar. She was no more in peril of capture at Messina than a man would be in peril of drowning if he stayed on the bank and did not go into the water. If the steamer had been chased by an Allied cruiser and sought shelter at Messina, and the cruiser remained outside waiting for her to reappear, the assured might perhaps have then reasonably claimed that the Master was prevented from resuming the voyage by reason of the presence, with hostile intentions, of the cruiser off the port, and in this way the imminence of the peril of capture might have been said to have frustrated the adventure.

The facts were, however, quite otherwise. The voyage was abandoned by the voluntary act of the Master who, fearing capture, sought shelter at Messina. A loss caused by fear of a peril is not a loss by the peril itself. If the peril is imminent or if it is present, then a loss caused by attempts to escape from it may be attributed to a loss by that peril. As, for instance, a vessel being chased by a submarine. The Master orders steam full ahead, and if, in spite of good seamanship, the vessel in escaping meets with an accident, the resulting damage would, I think, be considered to be a consequence of warlike operations.

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